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Supreme Court, U.S.
FILED

JUL 7 1999

No. 99 72

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IN THE

# Supreme Court of the United States

CHEMINOR DRUGS, LTD.; and
REDDY-CHEMINOR, INC.,

*Petitioners*,

*v.*

ETHYL CORPORATION; and
JOHN DOES 1 THROUGH 10,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

I. Does the Noerr-Pennington doctrine immunize a defendant from antitrust liability when the defendant has made fundamental misrepresentations to a federal agency, resulting in substantial harm to a competitor (a question as to which the circuit courts of appeals are in direct conflict)?

II. Does the Noerr-Pennington doctrine immunize material and fraudulent misrepresentations made to a federal agency acting in an adjudicatory capacity from liability for abuse of process, or for other common law causes of action such as malicious prosecution, tortious interference with contract, tortious interference with prospective economic advantage, and unfair competition?

## PARTIES TO THE PROCEEDING

The parties to the proceedings below were:

Appellants (Petitioners herein): Cheminor Drugs, Ltd., an Indian company and parent of Reddy-Cheminor, Inc., a New Jersey corporation and partially-owned subsidiary (hereafter collectively "Cheminor"). Schein Pharmaceutical, Inc. is a publicly-held company that owns more than 10% of the stock of Cheminor Drugs, Ltd., which owns more than 10% of the stock of Reddy-Cheminor, Inc.

Appellee (Respondent herein): Ethyl Corporation, a Virginia corporation ("Ethyl").

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## OPINIONS BELOW

On September 16, 1991, the United States International Trade Commission ("ITC") rendered a preliminary determination in connection with Ethyl's anti-dumping and countervailing duty ("AD/CVD") petition. A copy of the ITC's opinion is reprinted at page 73a of the Appendix submitted herewith ("73a").

On February 5, 1998, the United States District Court for the District of New Jersey rendered its opinion, which is reported at 993 F. Supp. 271 (D.N.J. 1998) and reprinted at 45a.

On March 1, 1999, a panel of the United States Court of Appeals for the Third Circuit rendered its opinion in this case, which is reported at 168 F.3d 119 (3d Cir. 1999) and reprinted at 1a. By a vote of 2-1, the panel affirmed the District Court's entry of summary judgment in favor of Ethyl.

By order filed April 8, 1999, the Third Circuit denied Cheminor's timely filed petition for a rehearing en banc. 110a. Five judges dissented from the denial of the petition.

## STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). This appeal seeks review of the opinion of the Third Circuit Court of Appeals rendered on March 1, 1999. 1a. The Third Circuit denied Cheminor's timely filed petition for a rehearing en banc on April 8, 1999. 110a. This petition is timely, as it has been filed within ninety (90) days of the denial of a petition for rehearing en banc. Supreme Court Rule 13.3.

## STATUTES AND REGULATIONS INVOLVED

U.S. Const. amend. I; 19 U.S.C. § 1671b(a) (West 1999) and 19 U.S.C. § 1677(7) (West 1999)[1]; and Fed. R. Civ. P. 60(b)(3). These authorities appear verbatim at 112a-131a.

## STATEMENT OF THE CASE

This appeal presents the issue of whether misrepresentations made in an administrative adjudicatory proceeding are immunized by the Noerr-Pennington doctrine and the First Amendment to the United States Constitution. This Court, together with the Ninth and District of Columbia Circuits, have ruled that those who make such misrepresentations do not enjoy immunity and may be liable for such misconduct.

Here, a divided Third Circuit panel held that so long as the misrepresentations did not render the adjudicatory petition "objectively baseless," as evidenced by the existence of "probable cause" to petition independent of the fraud, the misrepresentations were not sufficiently "material" to overcome Noerr-Pennington immunity.

### A. Ethyl's Petition before the International Trade Commission

Among other steps taken to impede Cheminor's entry into the United States bulk ibuprofen market, Ethyl filed an anti-dumping and countervailing duty (AD/CVD)

1. These statutes are the ones in force at the time of the Third Circuit's opinion in 1999. The Third Circuit cited and relied upon these amended statutes rather than those in force when the ITC rendered its decision in 1991.

petition with the United States International Trade Commission ("ITC") and Department of Commerce ("DOC"). Ethyl alleged that Cheminor was dumping ibuprofen in the United States at less than fair value and that the Indian government was subsidizing these sales.

The ITC had 45 days thereafter to determine, based upon information available to it at the time, whether there was a reasonable indication of "material injury" to Ethyl by reason of the imported ibuprofen in question. 19 U.S.C. § 1671b(a); 112a-113a. Ethyl misrepresented information regarding its sales, profitability, prices, and cash flow to establish material injury. Whereas Ethyl reported to the ITC that its profits had declined 75% during the relevant timeframe, in fact Ethyl's profits had nearly doubled. Further, Ethyl complained that it had lost customers to Cheminor without disclosing that this was because of unilateral and voluntary choices Ethyl made in its manufacture of bulk ibuprofen that had nothing whatsoever to do with Cheminor.[2]

In short, Ethyl's misrepresentations concerned three of five factors that the ITC is required by law to consider. As in all ITC proceedings, there is no opportunity to conduct discovery and the ITC did not learn that Ethyl had committed misrepresentations in its petition. Indeed, much

2. FDA regulations prohibited customers' purchase of bulk ibuprofen manufactured by a new process Ethyl voluntarily implemented until the customers completed a costly and time consuming FDA approval process. Ethyl was aware that the change in its manufacturing process would have this result, and misled the ITC by failing to disclose the fact that the only sales it lost to Cheminor were sales to small customers unwilling to incur the time and expense of the FDA approval process.

of the evidence that Ethyl presented to the ITC was subject to a protective order, and was redacted from the appendix attached to the ITC's preliminary determination.

On September 16, 1991, the ITC rendered its preliminary determination favorable to Ethyl based upon information provided by Ethyl. This resulted in a significant increase in import duties charged to Flavine International, Inc. ("Flavine"), Cheminor's sole distributor. Accordingly, Flavine cancelled its orders and Cheminor was involuntarily forced out of the United States bulk ibuprofen market.

Prior to the final hearing, Ethyl withdrew its ITC petition. Ethyl cited unexpected improvement in its financial condition that undercut its claim of material injury, a necessary element of its ITC case. Duties were automatically lifted, the price of Cheminor's ibuprofen automatically decreased, Flavine reinstituted its orders and Cheminor returned to the United States ibuprofen market.

**B. Cheminor's Subsequent Federal Action**

Cheminor then filed suit against Ethyl alleging antitrust and common law claims arising from Ethyl's knowing misrepresentation of its sales, profitability, prices, and cash flow to demonstrate material injury in the ITC proceeding. On February 5, 1998, the United States District Court for the District of New Jersey granted Ethyl's motion for summary judgment on the ground that Ethyl was immunized by the Noerr-Pennington doctrine from liability for misrepresentations made in the ITC proceeding. The District Court refused to exercise supplemental jurisdiction over Cheminor's various state law claims, even though it had diversity jurisdiction over the parties and all claims. 993 F. Supp. 271 (D.N.J. 1998); 45a, 71a.

On March 1, 1999, a divided panel of the Third Circuit affirmed the District Court's holding that the Noerr-Pennington doctrine immunized the misrepresentations made by Ethyl in the ITC proceeding. Acknowledging that the District Court had diversity rather than supplemental jurisdiction over plaintiff's common law claims, the Third Circuit nevertheless expanded the Noerr-Pennington doctrine to bar plaintiff's state law claims as well. 168 F.3d 119, 128 (3d Cir. 1999); 1a, 23a-26a.

On April 8, 1999, Cheminor's petition for a rehearing en banc was denied by a 7-5 vote of the judges of the Third Circuit. 110a.

## REASONS FOR GRANTING THE WRIT

### I.

### THIS CASE RAISES THE UNRESOLVED ISSUES OF WHETHER AND THE EXTENT TO WHICH FRAUD AND MISREPRESENTATION IN THE ADMINISTRATIVE ADJUDICATORY PROCESS ARE PROTECTED BY THE NOERR-PENNINGTON IMMUNITY DOCTRINE.

As a general rule, a party who petitions the government for a redress of grievances is immune from antitrust liability pursuant to the Noerr-Pennington doctrine. *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S. Ct. 523, 5 L. Ed. 2d 464 (1965). Noerr-Pennington immunity has been extended to protect those who petition courts and administrative agencies alike. *California Motor Transport*

*Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972).

The Noerr-Pennington doctrine has its exceptions. Specifically, the doctrine does not protect a litigant whose petition "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." *Noerr*, 365 U.S. at 144, 81 S. Ct. at 533.

In *California Motor Transport*, this Court provided examples of the types of misconduct that fall within the sham exception to Noerr-Pennington immunity. Simply put, misrepresentation in the adjudicatory process is not immunized:

> There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. *Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.*

*California Motor Transport*, 404 U.S. at 513, 92 S. Ct. at 613 (emphasis added).

In addition, the *California Motor Transport* Court held that "First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." *California Motor Transport*, 404 U.S. at 514, 92 S. Ct. at 613. Stated another way, the First Amendment does not provide immunity to those who

exercise their free speech and petition rights in violation of federal or state antitrust statutes. *Id.*

For decades following *California Motor Transport*, the basic principle that those who make misrepresentations in an adjudicatory context are not immunized from antitrust liability was applied consistently and nationwide. *See, e.g.*, *Oberndorf v. City of Denver*, 900 F.2d 1434, 1441, (10th Cir. 1990) (recognizing an exception to *Noerr* for illegal or fraudulent conduct such as perjury, fraud and bribery); *St. Joseph's Hosp. v. Hospital Corp. of America*, 795 F.2d 948, 955 (11th Cir. 1986) ("the plaintiff here has alleged misrepresentations before a government agency . . . acting judicially. Misrepresentations under these circumstances do not enjoy *Noerr* immunity"); *Hospital Building Company v. Rex Hospital*, 691 F.2d 678, 687 (4th Cir. 1982), *cert. denied*, 464 U.S. 890 (1983) ("misrepresentations, to fall within the sham exception to Noerr-Pennington immunity, must be made with the requisite intent. In these circumstances . . . misrepresentations made with intent to abuse the administrative processes . . . fall within the sham exception"); *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., et al.*, 690 F.2d 1240, 1261 (9th Cir. 1980), *cert. denied*, 459 U.S. 1227 (1983) ("we hold that the fraudulent furnishing of false information to any agency in connection with an adjudicatory proceeding can be the basis for imposition of antitrust liability, if the requisite intent is present and the other elements of an antitrust claim are proven. . . . There is no first amendment protection for furnishing with predatory intent false information to an administrative or adjudiciary body"); *Israel v. Baxter Laboratories, Inc.*, 466 F.2d 272, 275-80 (D.C. Cir.1972) ("no actions which impair the fair and impartial functioning of an administrative agency should be allowed to hide behind the cloak of an antitrust exemption").

Ironically, inconsistent holdings among the Circuit Courts of Appeal have arisen with this Court's attempt to clarify the scope of the sham exception to Noerr-Pennington immunity. In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993) ("PRE"), this Court articulated a two-part definition of the sham exception consisting of both objective and subjective components. "First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Id.* at 60. Second, an objectively baseless lawsuit must conceal a subjective intent " 'to interfere *directly* with the business relationships of a competitor,' through the 'use of the governmental *process* — as opposed to the *outcome* of that process — as an anticompetitive weapon.' " *PRE*, 508 U.S. at 60-61 (emphasis in original) (citations omitted).

Significantly, the PRE Court did not decide whether this two-part definition of the sham exception to Noerr-Pennington immunity applies in cases of fraud or misrepresentation, as there was no allegation of misrepresentation in that case. *PRE*, 508 U.S. at 54. The PRE Court expressly stated: "We need not decide here whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations." *Id.* at 61 n.6. Indeed, the PRE Court quoted *California Motor Transport* for the unambiguous and longstanding proposition that misrepresentations in the adjudicatory process are simply not immunized. *Id.*

Here, this case squarely presents the Court with the opportunity to decide the questions expressly left unresolved in *PRE*, as well as to resolve conflicts that have arisen and

are described more fully below regarding the meaning and scope of PRE's two-part sham test.

## II.

## THE THIRD CIRCUIT'S DECISION IS INCONSISTENT WITH DECISIONS OF THE D.C. AND NINTH CIRCUITS AS TO WHETHER MISREPRESENTATIONS IN THE ADMINISTRATIVE ADJUDICATORY PROCESS ARE PROTECTED BY THE NOERR-PENNINGTON IMMUNITY DOCTRINE.

With the Third Circuit's opinion in the instant case, the Circuit Courts of Appeals are now divided as to the continuing viability of the longstanding rule set forth in *California Motor Transport* that misrepresentations in the adjudicatory process are not immunized by the Noerr-Pennington doctrine. The Circuits are also divided as to whether PRE's two-part definition of the sham exception to Noerr-Pennington immunity applies at all in cases of fraud or misrepresentation.

The Ninth and D.C. Circuits have held, consistent with *California Motor Transport* and its progeny, that fraud and intentional misrepresentations are not immunized. For instance, in *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1031 (1999), the defendant had allegedly made false statements of fact and misrepresentations about plaintiff in an administrative adjudicatory context to eliminate plaintiff's competition and preserve its monopoly in the local kidney dialysis market. The Ninth Circuit held that if pleaded with particularity and proven, such misrepresentations are not immunized:

> [I]n the context of a judicial proceeding, if the alleged anticompetitive behavior consists of making intentional misrepresentations to the court, litigation can be deemed a sham if 'a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy.'

*Kottle*, 146 F.3d at 1060 (citations omitted).

Indeed, the Ninth Circuit has held that PRE's two-part sham test does not apply at all to misrepresentations made in an adjudicatory proceeding because such misrepresentations deprive the proceeding of its legitimacy. *Id.* at 1063. This means that where antitrust claims are predicated upon misrepresentation, the sham exception applies even without proof of objective baselessness. *Id.* at 1060.

Similarly, the D.C. Circuit holds that fraud and misrepresentation are not immunized by the Noerr-Pennington doctrine, and are not subject to this Court's two-part definition of the sham exception in *PRE*:

> However broad the First Amendment right to petition may be, it cannot be stretched to cover petitions based on known falsehoods. . . . 'Attempts to influence governmental action through overtly corrupt conduct, such as bribes (in any context) and misrepresentation (in the adjudicatory process), are not normal and legitimate exercises of the right to petition, and activities of this sort have been held beyond the protection of *Noerr*.'

*Whelan v. Abell*, 48 F.3d 1247, 1255 (D.C. Cir. 1995) (citations omitted).

Contrary to longstanding Supreme Court precedent and the foregoing authorities, a divided Third Circuit panel held in this case that those who commit misrepresentation in an adjudicatory proceeding enjoy Noerr-Pennington immunity from antitrust liability, so long as the prior adjudicatory petition was not "objectively baseless." *Cheminor*, 168 F.3d at 124; 12a-14a.[3]

The Third Circuit assumed that Ethyl had indeed intentionally misrepresented three of five statutorily-mandated factors, each of which the ITC was required to consider in deciding whether Ethyl had established the material injury prong of its AD/CVD petition. Indeed, both the majority and dissent recognized that "the ITC actually relied . . . in part on Ethyl's representations of its financial condition" in rendering its preliminary determination. *Id.* at 126, 133; 18a, 39a. However, because the ITC had not relied exclusively on the factors Ethyl misrepresented, the misrepresentations — although significant and influential — had not demonstrably determined the petition's outcome.

According to the reasoning of the panel majority, the misrepresentations here were *material to the decision-making process* (because they were of a very significant

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3. The panel majority declined to apply the sham exception based on the deliberate material misrepresentations alleged here because it believed that to do so was "to carve out a new exception to the broad immunity that *Noerr* provides." *Cheminor*, 168 F.3d at 123; 11a. But see *California Motor Transport*, 404 U.S. at 513, 92 S. Ct. at 613 ("Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.").

magnitude and concerned factors that must by law be considered) but were not *material to the ITC's outcome* (because the ITC did not rely exclusively on the misrepresented material). This led the panel majority to conclude that Ethyl's misrepresentations were not necessarily "material" to the ITC's decision, as the ITC also considered and therefore could have relied on other statutory factors that were not misrepresented.

Stated another way, because Ethyl had not misrepresented each and every indicator of material injury that the ITC is required by law to consider, Ethyl had "probable cause" to file a petition that was not "objectively baseless." After all, some truthful evidence had been presented. Accordingly, the majority held that however intentional or outrageous its misrepresentations, Ethyl enjoyed Noerr-Pennington immunity from liability pursuant to the two-part sham test set forth in *PRE*. 21a.

In her dissent, Judge Sloviter warned that by immunizing misrepresentations regarding some but not all factors that must be weighed in reaching a decision regarding material injury, the panel majority undermined the legitimacy of the adjudicatory decisionmaking process. This is because it is impossible to determine how the ITC would have weighed the statutory factors had Ethyl not misrepresented its "sales, profitability, prices, and cash flow — three of the five statutorily-mandated indicia of injury."[4] *Cheminor*, 168 F.3d at 133; 39a (Sloviter, J., dissenting).

Judge Sloviter observed that Ethyl's misrepresentation that profits had declined 75% when in fact profits had nearly

4. It is often difficult to determine what importance an adjudicatory body attributes to particular pieces of evidence. Here, (Cont'd)

doubled would have affected any analysis of whether Ethyl sustained material injury — even if the misrepresentation did not determine the outcome of its petition. "The USITC might have decided that strong evidence of a financially healthy domestic industry outweighed any data suggesting that Cheminor's market share was increasing. Ethyl's misrepresentations deprived the USITC of that opportunity, undermining the legitimacy of its decision making process." *Cheminor*, 168 F.3d at 133; 40a (Sloviter, J., dissenting).

Judge Sloviter noted that the majority's decision was inconsistent with the holdings of the Ninth and D.C. Circuits that the *PRE* "objectively baseless" test does not apply at all in cases of fraud and misrepresentation. *Id.* at 130-131; 32a-33a. Judge Sloviter also warned that the majority's test gives incentive to a litigant such as Ethyl to bolster its AD/CVD petition with blatant misrepresentations regarding some but not all statutory factors. It can do so confident that so long as the product of this fraud has some truthful kernel to establish that it is not "objectively baseless" in its entirety, the fraud will be immunized pursuant to the Third Circuit's view regarding the scope of Noerr-Pennington immunity:

> By thus conflating the concepts of 'material' and 'objectively baseless,' the majority ignores the risk that a party will intentionally use fraud and misrepresentation to transform a claim that is

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(Cont'd)

the ITC's preliminary determination references a redacted appendix of Ethyl's documents, which in turn are subject to a protective order. It is therefore impossible to retrace the ITC's steps in a decisionmaking process uniquely vulnerable to the very sort of misrepresentation that occurred in this case.

> otherwise weak and unlikely to prevail, although not 'objectively baseless,' into one that succeeds.

*Id.* at 131; 34a-35a (Sloviter, J., dissenting).

There is no remedy for the fraud that the Third Circuit is uniquely prepared to tolerate. Although the Third Circuit notes that final judgments predicated upon fraud may be set aside pursuant to Fed. R. Civ. P. 60(b)(3), there was no final judgment in the ITC case. Instead, after destroying Cheminor's business, Ethyl withdrew its petition claiming that its financial condition had improved during the course of the proceedings. In any event, vacating a judgment obtained by fraud does not compensate the victim of the fraud for its damages, just as lifting tariffs and permitting future bulk ibuprofen sales did not compensate Cheminor for the damages it incurred when temporarily forced out of the market by Ethyl's misconduct in this case.

The effect of the Third Circuit's decision will not be limited to proceedings before the ITC. Material misrepresentations are an affront to the administrative process. The Third Circuit placed too great a burden on a respondent — who is unlikely to even learn the details of the misrepresentations, since there is no discovery in the administrative proceeding — and gave insufficient weight to the goal of preserving the proper functioning of administrative decision-making. As the Ninth Circuit held in *Clipper Exxpress*:

> Adjudicatory procedures will not always ferret out misrepresentations. Administrative bodies and courts . . . rely on the information presented by the parties before them. They seldom, if ever,

**PUBLISHER'S NOTE:**

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may have some shred of probable cause and objective basis, yet still constitute an abuse of process due to the "collateral harm 'external to the litigation or to the result reached in the litigation.' " *Id.* at 70 (citation omitted).

Stated another way, the majority's objectively baseless test could be misconstrued to immunize misconduct that raises no First Amendment concern whatsoever:

> The existence of a tort of abuse of process shows that it has long been thought that litigation could be used for improper purposes even when there is probable cause for the litigation; . . .

*PRE*, 508 U.S. at 74 (Stevens, J., concurring), quoting *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 471-72 (1982) (Posner, J.) ("If all nonmalicious litigation were immunized from government regulation by the First Amendment, the tort of abuse of process would be unconstitutional — something that, so far as we know, no one believes.").

Abuse of process has two components under New Jersey law: an "ulterior motive" in issuance of process, such as a summons or writ; and some subsequent "further act" whereby a tortfeasor "demonstrably used process after its issuance solely to coerce or injure his adversary." *SBK Catalogue Partnership v. Orion Pictures*, 723 F. Supp. 1053, 1067-68 (D.N.J. 1989).

Here, Ethyl committed abuse of process in the ITC proceeding when it obtained process in order to commit further acts for anticompetitive and oppressive advantage over Cheminor. For instance, Ethyl made perverted use of

the ITC proceeding in order to temporarily exclude Cheminor from the domestic ibuprofen market just long enough (1) to undercut Cheminor's credibility as a reliable long-term source of bulk ibuprofen, because its ability to conduct business can be at least temporarily ended by a fraudulent ITC proceeding brought at Ethyl's whim; (2) to force bulk ibuprofen customers to undergo burdensome FDA approval of Ethyl's new ibuprofen production process when they would not otherwise have done so, and thereby put Ethyl in a position to regain bulk ibuprofen sales from its former customers; and (3) to attempt to coerce Cheminor to sell to Ethyl at an extraordinarily low price hundreds of tons of bulk ibuprofen that Cheminor could not sell in the United States due to Ethyl's fraudulently-obtained preliminary determination.

Ethyl's use of fraud and misrepresentation in obtaining process to temporarily coerce market participants during a limited window is not the type of abuse of process misconduct that either the First Amendment or the Noerr-Pennington doctrine should protect. Indeed, this is the very type of anticompetitive collateral damage — independent of all First Amendment concerns — of which Justices Stevens and O'Connor warned in *PRE*.

The same is true with respect to other common law causes of action to the extent that they arise from facts that do not implicate First Amendment or Noerr-Pennington concerns. Simply put, Ethyl should not be immunized from liability for collateral damage caused by tortious misconduct independent of the filing of its ITC petition. The act of petitioning a court or agency should not be deemed a license to commit common law torts arising from facts independent of the filing of the petition.

This case thus presents the Court with the opportunity to address the foregoing concerns raised by Justices Stevens and O'Connor, and to foreclose the type of Machiavellian mischief and fraud on the court and federal agencies that overbroad application of Noerr-Pennington immunity is sure to generate in the future.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND DECIDED MARCH 1, 1999

**CHEMINOR DRUGS, LTD.; Reddy-Cheminor, Inc., Appellants**

v.

**ETHYL CORPORATION; JOHN DOES 1 THROUGH 10.**

**No. 98-6004.**

United States Court of Appeals,
Third Circuit.

Argued Oct. 30, 1998.

Decided March 1, 1999.

* * *

BEFORE: SLOVITER, GARTH, and MAGILL,* Circuit Judges.

### OPINION OF THE COURT

GARTH, Circuit Judge:

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* Hon. Frank J. Magill, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

*Appendix A*

This appeal requires us to analyze whether alleged misrepresentations by the defendant Ethyl Corp. ("Ethyl")[1] vitiates application of the immunity afforded by the *Noerr-Pennington* doctrine and thus defeats Ethyl's "objective basis" for petitioning the government for protection of its bulk ibuprofen industry from imports of bulk ibuprofen by plaintiffs Cheminor Drugs, Ltd. and Reddy-Cheminor, Inc. (collectively, "Cheminor").

Cheminor's ibuprofen exports to the United States were found to be heavily subsidized by the Government of India ("India"), and Cheminor was found to sell its imported ibuprofen in the United States at substantially less than fair value. The District Court granted summary judgment in favor of Ethyl, holding that Ethyl's petition was not a "sham" and was thus protected activity pursuant to the First Amendment of the United States Constitution. We affirm.

I.

Cheminor and Ethyl are both manufacturers of bulk ibuprofen for sale to tableters; Cheminor is an Indian company, and Ethyl is a United States company. On July 31, 1991, Ethyl complained to the United States International Trade Commission ("ITC") and the Department of Commerce ("DOC") about Cheminor's

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1. The Amended Complaint lists the defendants as "Ethyl Corporation and John Does 1-10." It describes the "Doe" defendants as "individuals and corporate entities including Ethyl's employees, agents, and unrelated corporate entities which conspired with Ethyl in the misconduct alleged in the complaint." For ease in reference, we will refer throughout this opinion to all defendants as "Ethyl."

dumping of ibuprofen and its sale at less than fair value, and Ethyl alleged that India was subsidizing the manufacture of the ibuprofen. After receiving information from Ethyl through its petition and a detailed questionnaire, the ITC and DOC made preliminary determinations that Cheminor would be taxed on its imports because it was receiving subsidies from India, it was dumping ibuprofen at less than fair value in the United States, and the domestic industry suffered material injury as a result. Before final determinations could be made, however, Cheminor withdrew from the U.S. market — its sole distributor, Flavine International, Inc., canceled its orders for ibuprofen because the cost to be charged by Cheminor was prohibitive. Ethyl then withdrew its complaint from the ITC and DOC on March 4, 1992, stating that it would refile if necessary.

Cheminor then brought federal and state antitrust claims and various state common law claims against Ethyl by a complaint filed in the District Court for the District of New Jersey. Cheminor moved for summary judgment, claiming that Ethyl's administrative complaints to the ITC about Cheminor's below-market pricing and the resultant injuries to Ethyl were baseless, made in bad faith, contained false statements, and were brought only for anti-competitive reasons. In response, Ethyl asserted that its administrative complaints had a legal basis, were made in good faith, and were truthful. As such, Ethyl argued that the *Noerr-Pennington* doctrine, which protects the right of citizens and corporations to petition the government for grievances and is based on the First Amendment of the United States Constitution, prohibits Cheminor's antitrust and unfair trade claims.

*Appendix A*

The District Court granted Ethyl's motion for summary judgment, holding that Ethyl was protected from Cheminor's federal and state antitrust claims by *Noerr-Pennington* immunity. Specifically, the District Court held that no genuine issues of fact existed on the question of whether Ethyl had an objective basis to file a petition with the ITC and the DOC. In addition, the District Court, in its discretion, declined to exercise supplemental jurisdiction, 28 U.S.C. § 1367(c), over Cheminor's tort claims brought under state law. The District Court did not consider whether it had diversity jurisdiction under 28 U.S.C. § 1332.

Summary judgment was entered on behalf of defendant Ethyl on February 5, 1998, disposing of all claims against all parties.[2] Plaintiff Cheminor filed its notice of appeal on March 3, 1998. The District Court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1332. We exercise jurisdiction pursuant to 28 U.S.C. § 1291.

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). We give the grant of summary judgment plenary review.

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2. The District Court's order of February 5, 1998 granted Ethyl's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56(c) "for an Order of dismissal of the Complaint." App. 3088. Because the grant of summary judgment and the dismissal of the complaint are inconsistent, we will disregard reference to the "dismissal" of Cheminor's complaint and treat the record as a summary judgment record.

*Appendix A*

II.

If a United States business or industry believes that it is being injured by foreign-made subsidized products that are imported into the United States and sold at less than fair value, the business or industry may seek relief from the ITC by filing an antidumping ("AD") and countervailing duty ("CVD") petition ("AD/CVD petition")[3] with the ITC and the DOC[4] to obtain relief in the way of extra duties to offset alleged subsidies.

An AD/CVD petition receives consideration at two levels. First, preliminary determinations of subsidies and antidumping are made by DOC and a preliminary determination of "material injury" or "threat of material injury" to the domestic industry is made by the ITC. The DOC and the ITC base their preliminary determinations upon the complaining firm's petition and questionnaire, the respondent firm's questionnaire, if available, and argument from all interested parties' counsel. Second, once the preliminary determinations have been made in petitioner's

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3. The Countervailing Duty investigation inquires whether the foreign company received subsidies from its government. The Antidumping investigation deals with the question of whether the foreign company actually brought the subsidized goods into the United States and sold them for less than fair value.

4. The ITC and the DOC divide up the investigation. The ITC determines whether the domestic industry has suffered material injury; the DOC determines whether the foreign company has received foreign government subsidies and whether the foreign company has been dumping product at less than fair value.

(here, Ethyl's) favor, the DOC imposes duties upon the imported product. The DOC and ITC make final determinations after they have conducted their own investigations (collecting information apart from the complainant's petition and questionnaire) and after they have heard further arguments from the parties involved.[5]

On September 16, 1991, based upon the "best information available,"[6] the ITC made a preliminary determination that there was material injury to the domestic market[7] caused by Cheminor's receipt of subsidies from the Indian government and dumping of bulk ibuprofen into the United States market at less than fair value. App.2077-2147 (ITC report). On December 13, 1991, the DOC made a preliminary determination of countervailing duty (CVD). DOC determined that India had subsidized Cheminor in the amount of 43.71%, and thus DOC imposed a 43.71% *ad*

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5. In a preliminary determination, the ITC must determine whether there is a *reasonable indication* of material injury or the threat thereof to the domestic industry "by reason of" the imports under investigation. In its final determination, the ITC must determine that there is a material injury or threat thereof to the domestic industry by reason of the imports under investigation.

6. The best information available comprised Ethyl's petition and questionnaire and arguments from the parties' counsel — Cheminor refused to submit verified information to the ITC.

7. Ethyl's ibuprofen constituted the entire domestic market because it was the only domestic manufacturer of ibuprofen at the time the petition was filed.

*valorem* duty on Cheminor's ibuprofen. App. 1471.[8] On January 13, 1992, Cheminor informed the ITC and DOC that it would be withdrawing from the United States market.

On February 27, 1992, DOC made a preliminary determination on the antidumping (AD) petition. DOC found that imports of ibuprofen from India were being sold in the United States at less than fair value and that there was an estimated dumping margin of 115.94%.App. 1472.[9] Ethyl withdrew its AD/CVD petition on March 4, 1992, stating that it no longer believed it could succeed in a final determination based on its then new profit figures and Cheminor's decision to exit the United States market.

III.

A party who petitions the government for redress generally is immune from antitrust liability. *Eastern R.R.*

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8. The Government of India subsidized the production of bulk ibuprofen for export by establishing: (1) below interest rate loans for exporters, (2) post-shipment financing loans to enable exporters to extend credit to foreign buyers, (3) tax deductions for foreign sales, (4) a rebate of indirect taxes on exported merchandise, and (5) duty-free importation of raw materials used in exported products (Advance licenses). App. 2172-82.

9. The basic formula for determining a dumping margin is defined as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35). The actual determination of the dumping margin requires substantial economic analyses. *See, e.g.*, Raj Bhala, *Rethinking Antidumping Law*, 29 Geo. Wash. J. Int'l L. & Econ. 1, 30-50 (1995).

*Presidents Conference v. Noerr Motor Freight,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *United Mine Workers of Am. v. Pennington,* 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965) ("*Noerr-Pennington* doctrine"). This immunity extends to persons who petition all types of government entities — legislatures, administrative agencies, and courts. *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972) ("The right of access to the courts is indeed but one aspect of the right of petition."). "[W]here restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." *Noerr,* 365 U.S. at 136, 81 S.Ct. 523 (citations omitted).

*Noerr-Pennington* immunity does not apply, however, to petitions or lawsuits that are a "mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Noerr,* 365 U.S. at 144, 81 S.Ct. 523. Often, a petition to the government causes an anti-competitive effect, but "evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham." *Professional Real Estate Investors v. Columbia Pictures Indus., Inc.,* 508 U.S. 49, 57-58, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993) ("*PRE*").

In *PRE,* the Supreme Court held that litigation is a sham if the lawsuit is "objectively baseless." But "[t]he existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation." *Id.* at 62, 113 S.Ct. 1920. The Court then stated, "Probable cause to institute civil proceedings requires no

more than a reasonable belief that there is a chance that a claim may be held valid upon adjudication . . . . the existence of probable cause is an absolute defense." *Id.* at 62-63, 113 S.Ct. 1920 (internal quotation marks, brackets, and citations omitted). The Court concluded its discussion by stating "a proper probable-cause determination irrefutably demonstrates that an antitrust plaintiff [here, Cheminor] has not proved the objective prong of the sham exception and that the defendant [here, Ethyl] is accordingly entitled to *Noerr* immunity." *Id.* at 63, 113 S.Ct. 1920.

It was in this context that the Court announced a two-step test:

> First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals an attempt to interfere *directly* with the business relationships of a competitor, through the use of governmental *process* — as opposed to the *outcome* of that process — as an anticompetitive weapon. This two-tiered process requires the plaintiff to disprove the challenged

> lawsuit's legal viability before the court will entertain evidence of the suit's economic viability.

508 U.S. at 60-61, 113 S.Ct. 1920 (1993) (citations omitted) (emphasis in original). Accordingly, applying the Court's *Noerr-Pennington* immunity test to Ethyl's petition, we must determine whether Ethyl had probable cause to file its petition, and in making that determination, we must be satisfied that the petition filed was not objectively baseless in the sense that Ethyl could not reasonably expect success on the merits.[10]

The Supreme Court has not addressed how alleged misrepresentations affect *Noerr-Pennington* immunity or the sham exception to *Noerr-Pennington* immunity. In *PRE,* the Court explicitly declined to decide whether the sham exception to immunity would include situations where the litigant had perpetrated "fraud" or had made "other misrepresentations." *Id.* at 61 n. 6, 113 S.Ct. 1920.[11]

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10. We recognize that the second step of the Supreme Court's test comes into play only if the petition is objectively baseless and therefore without probable cause. Because, as discussed *infra*, we are satisfied that Ethyl's petition was not "objectively baseless," and that Ethyl had probable cause to file its petition, we have no need to discuss Ethyl's subjective intent, which is the subject of the second part of the Supreme Court's definition of sham.

11. In footnote six of *PRE,* the Court cited Fed.R.Civ.P. 60(b)(3), which allows a federal court to "relieve a party . . . from a final judgment" for "fraud . . . misrepresentation, or other (Cont'd)

Cheminor argues either that *Noerr-Pennington* immunity does not apply at all to petitions containing misrepresentations or that Ethyl's alleged misrepresentations led to the conclusion that the Ethyl's AD/CVD petition to the ITC and DOC was objectively baseless.

We decline to carve out a new exception to the broad immunity that *Noerr-Pennington* provides. Rather, we will determine whether Ethyl's petition was objectively baseless under the Supreme Court's test in *PRE, without regard to those facts that Cheminor alleges Ethyl misrepresented.* If the alleged misrepresented facts do not infect the core of Ethyl's claim and the government's resulting actions, then the petition had an objective basis and will receive *Noerr-Pennington* immunity under the first step of *PRE.* While we do not condone misrepresentations in a judicial setting, neither will we deprive litigants of immunity derived from the First Amendment's right to petition the government if the alleged misrepresentations do not affect the core of the litigant's (here, Ethyl's) case. We note that other remedies such as provided by under Federal Rules of Civil Procedure 11 and 60(b)(3), exist for alleged misrepresentations that do not taint the core of the litigant's case. *See supra* note *11.*

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(Cont'd)
misconduct of an adverse party." The Court also cited *Walker Process Equip., Inc. v. Food Machinery & Chem. Corp.*, 382 U.S. 172, 176-77, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965); *id.* at 179-80, 86 S.Ct. 347 (Harlan, J., concurring), in which the Court held that a purported patent-holder could not avoid antitrust liability for his suit against an alleged infringer if the purported patent-holder's patent was based upon material misrepresentations.

*Appendix A*

In *Music Center S.N.C. Di Luciano Pisoni & C. v. Prestini Musical Instruments Corp.*, 874 F.Supp. 543, 549 (E.D.N.Y.1995), the court was faced with circumstances similar to the circumstances we face here. Because we agree with the matters noted for consideration by the *Music Center* court, we will evaluate the information upon which the instant petition was based as the court in *Music Center* evaluated the circumstances there:

> [A] determination [of objective basis] requires consideration, *inter alia,* of the outcome of the proceedings, including the findings made by the relevant administrative tribunals, the nature of the particular allegations of the petition or actions before the administrative agency claimed to be fraudulent or improper, and whether these claimed misrepresentations or improper actions would have been significant to the ultimate outcome or continuation of the proceeding.

*Music Center,* 874 F.Supp. at 549 (holding that defendants were entitled to *Noerr-Pennington* immunity for filing AD/CVD petition despite allegations of misrepresentations in the petitions because the defendants had an objective basis for filing the petitions). If the government's action was not dependent upon the misrepresented information, the misrepresented information was not material and did not go to the core of Ethyl's petition. In sum, a *material* misrepresentation that affects the very core of a litigant's (here, Ethyl's) case will preclude *Noerr-Pennington* immunity, but not every misrepresentation is material to

the question of whether a petition such as Ethyl's had an objective basis.[12]

IV.

We will assume, for the purposes of determining whether Ethyl had an objective basis to file its AD/CVD petition, that the statements that Ethyl made in its petition and questionnaire and are alleged by Cheminor to be false were, in fact, false. We note, however, that if this case were to proceed to trial, Cheminor might not be able to prove that they were false, as Ethyl has articulated reasonable explanations for the truth of their statements, or at least, that the representations made as to its financial condition

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12. Our approach in requiring that misrepresentations must be *material* to bar *Noerr-Pennington* immunity is consistent with the two other circuit courts of appeals that have considered this issue. The Ninth Circuit held that *Noerr-Pennington* immunity does not extend to parties who make knowing *material* misrepresentations in the course of a litigative proceeding. *See Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056 (9th Cir.1998) (citing *Clipper Exxpress v. Rocky Mountain Motor Tariff*, 690 F.2d 1240, 1260 (9th Cir.1982)). The District of Columbia Circuit disallowed a *Noerr-Pennington* defense in an action for common law torts because the defendants had made *material* misrepresentations to state securities regulators. *Whelan v. Abell*, 48 F.3d 1247 (D.C.Cir.1995). Moreover, misrepresentations made to procure a patent must rise to the level of fraud in order to cause a patent infringement action to fail — unethical behavior alone is insufficient. *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1070-71 (Fed.Cir.1998) (discussing *Walker Process Equip., Inc. v. Food Machinery & Chem. Corp.*, 382 U.S. 172, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965)).

were reasonable estimates of the profits Ethyl would sustain based upon predictions of various research and development costs and capital expenditures.

To have an objective basis to file a AD/CVD petition with the ITC and DOC, Ethyl must have had a reasonable belief that Cheminor was dumping ibuprofen that was subsidized by India in the United States at less than fair value, and that the dumping caused material injury or threat of material injury to the domestic market[13] We are satisfied that Ethyl had such an objective basis because (1) India was subsidizing at a rate of 43.71% Cheminor's production of ibuprofen; (2) Cheminor was dumping the subsidized ibuprofen in the United States at a 115.42% margin; and (3) Ethyl was suffering material injury or was threatened with material injury as a result of the dumping.

Cheminor takes issue with only one of these three conclusions — that Ethyl was suffering material injury or that it was threatened with material injury. 19 U.S.C. § 1677(7). Under the statute, the ITC must make three determinations before it can find "material injury:"

> (I) the volume of the imports of the subject merchandise, (II) the effect of the imports of that merchandise on prices in the United States for domestic like products, and (III) the *impact of*

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13. *See Gerald Metals, Inc. v. United States,* 132 F.3d 716, 719-20 (Fed.Cir.1997); *American Spring Wire Corp. v. United States,* 590 F.Supp. 1273, 1276 (C.I.T.1984); *SCM Corp. v. United States,* 544 F.Supp. 194, 199-200 (C.I.T.1982).

> *imports* of such merchandise *on domestic producers* of domestic like products, but only in the context of production operations within the United States.

19 U.S.C. § 1677(7)(B)(i)(I)-(III) (emphasis added). In addition, the ITC "may" consider other "relevant" economic factors. 19 U.S.C. § 1677(7)(B)(ii). The statute goes on to expand upon and define each of the three required determinations of 19 U.S.C. § 1677(7)(B)(i)(I)-(III). Of concern here is the third (III) required determination for material injury, *i.e.*, the impact of the imports on the domestic producers (underlined above).

This third determination is further defined by reference to factors in 19 U.S.C. § 1677(7)(C)(iii)(I)-(V):

> (iii) Impact on affected domestic industry
>
> In examining the impact required to be considered under subparagraph (B)(i)(III), the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to —
>
> (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
>
> (II) factors affecting domestic prices,

> (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,
>
> (IV) actual and potential negative effects on the existing development and production efforts in the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and
>
> (V) in a proceeding under Part II of this subtitle, the magnitude of the margin of dumping.
>
> The Commission shall evaluate all relevant economic factors described in this clause within the context of the business cycle and conditions of competition that are distinctive to the affected industry.

19 U.S.C. § 1677(7)(C)(iii)(I)-(V). The ITC has discretion to give these factors found in § 1677(7)(C)(iii)(I)-(V) of the trade statute varying degrees of weight in making its determination of material injury. *SCM Corp. v. United States,* 544 F.Supp. 194, 199-200 (C.I.T.1982). A court reviews the ITC's (and DOC's) discretionary determinations by "evaluating whether they are 'unsupported by substantial evidence on the record, or otherwise not in accordance with law.' " *Gerald Metals, Inc. v. United States,* 132 F.3d 716, 719 (Fed.Cir.1997) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i)

(1994)). No one single fact about the domestic industry, the market, or the imported product is dispositive to the issue of material injury: the record as a whole requires evaluation. *Music Center,* 874 F.Supp. at 549.

Cheminor alleges that Ethyl gave the ITC inaccurate information regarding its profitability during the first half of 1991,[14] which caused the ITC to determine erroneously that Ethyl had suffered material injury. Cheminor cites three alleged misrepresentations made by Ethyl that masked Ethyl's true profitability: (1) research and development costs and capital expenditures were allocated to the first half of 1991 but were not expected to be charged on Ethyl's books until the second half of 1991; (2) research and development costs for S+ ibuprofen should not have been included at all because S+ ibuprofen was not at issue in the AD/CVD petition; and (3) Ethyl falsified its lost sales resulting from Cheminor's imported product.[15] All of these "false"

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14. Ethyl provided profitability data for the period 1988 through the first six months of 1991. Among other charges, Cheminor alleges that the data for the first six months of 1991 was misrepresented. However, of the charges made by Cheminor, each was refuted by Ethyl in its brief to the Court, and in any event, each of Cheminor's charges were deemed to be not material by the ITC. *See* Appellee's Br. at 15-16; *infra* pp. 125-26 (discussing the views of the ITC).

15. Cheminor also alleges that Ethyl made misrepresentations regarding Cheminor's market share that made Cheminor's market share look larger than it really was. However, Cheminor was in a better position to inform the ITC and the DOC about its own market share, but, as we have noted previously, *see supra* note 6, Cheminor chose not to furnish the ITC or DOC with its market share information.

statements, Cheminor alleges, resulted in the ITC's erroneous conclusion that Ethyl's profits were down while Cheminor's market share was up in the first half of 1991, which in turn caused the ITC to make a finding of material injury to Ethyl.

The statements in Ethyl's petition and questionnaire relating to Ethyl's profitability in the first half of 1991 bear on only a small proportion of the numerous factors the ITC must consider when making a determination of material injury. In the instant case, the ITC found that the domestic market had sustained material injury. The ITC issued a report explaining its decision to preliminarily grant Ethyl's AC/CVD petition. The ITC's finding set forth in the "Views of the Commission" that the domestic industry incurred injury, relied only in part on Ethyl's representations of its financial condition:

> The financial trends provide reasonable indication of present material injury. For example, as illustrated by the public exhibit introduced by Ethyl at the conference, the industry's [Ethyl's] profitability (as measured by the profit-to-sales ratio) declined substantially from the beginning to the end of the investigatory period, despite an increase in 1989 from the 1988 level.
>
> Confidential information concerning other factors, such as [Cheminor's] apparent domestic consumption and market share, further provide a reasonable indication of present injury.

> Accordingly, on the basis of the information gathered in these preliminary investigations, we find a reasonable indication of material injury to the domestic industry producing bulk ibuprofen.

App.2097 (footnote omitted). As demonstrated by this finding, the ITC relied upon a number of reasons for its determination that the domestic industry had been affected and thus that Ethyl had suffered material injury. The record reflects that the ITC was aware that Ethyl's research costs were high during the first six months of 1991. App.2048 (Redacted Post Conference brief of Cheminor before the ITC).[16] Moreover, the ITC found that the market share and domestic consumption of Cheminor's ibuprofen contributed to its determination that there was material injury to the domestic industry.

The Acting Chairman of the ITC, Anne Brunsdale, did not join the reasoning in the "Views of the Commission" on the issue of material injury to the domestic industry. Brunsdale thus filed "Additional Views," in essence, a concurring opinion to the "Views of the Commission." Brunsdale also found that there was material injury to the domestic industry, but she did not rely upon Ethyl's assertions of decreased profits that Cheminor has alleged

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16. Ethyl noted in its brief that despite attempts to obtain an unredacted version of the Post Conference brief, Cheminor did not produce it. Nevertheless, it appears from the redacted version that Cheminor argued to the ITC that it should consider that Ethyl's research costs were higher than normal during the first six months of 1991.

to be false. Instead, she gave three reasons for her material injury determination: (1) the Indian imports are a suitable substitute for domestic ibuprofen; (2) "the alleged dumping and subsidy margins in these investigations are quite high;" and (3) *the share of the U.S. market held by Indian ibuprofen* "was not small enough, when combined with other factors, to ensure that there is no material injury [to the domestic market] by reason of the 'unfair' imports." App. 2105-08. Brunsdale had knowledge of Ethyl's financial condition, but she did not find it to be determinative in light of the other factors indicating that the domestic industry was affected by Cheminor imports of ibuprofen.[17]

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17. We note here that the dissent, in referring to the view of Acting Chairman Anne Brunsdale, does not refute the fact that Brunsdale did not rely on Ethyl's assertions of decreased profits. Commissioner Brunsdale's separate opinion itself provides evidence of Ethyl's *probable cause* to file its ITC petition. Indeed, the dissent nowhere even acknowledges that the standard of probable cause as announced by the Supreme Court in *PRE*, 508 U.S. at 62-63, 113 S.Ct. 1920, is the crucial test in the determination of the applicability of *Noerr-Pennington* immunity, as we have pointed out. *See supra* pp. 122-23. Rather, the attempt by the dissent to structure a wholly separate exception to *Noerr-Pennington* for fraud or misrepresentation, which is nowhere found in the jurisprudence, cannot take the place of *PRE's* required probable cause standard. Thus, the question to be answered in this case under the controlling standard is whether by reason of Ethyl's success in having the USTR remove Indian ibuprofen from the General System of Preferences list, Cheminor's receipt of subsidies from India, Cheminor's dumping of ibuprofen in the United States at less than fair value, and the harm and threat of harm to Ethyl by reason of Cheminor's dumping, Ethyl had probable cause to file an AD/CVD petition.

Thus, all ITC Commissioners, albeit in separate findings, determined that Ethyl had suffered material injury by Cheminor's imports based on factors other than Ethyl's profitability.[18]

Our review of the ITC and Brunsdale's analyses, in conjunction with the uncontested DOC preliminary determinations of 43.71% subsidization and 115.42% dumping margin, leads us to the conclusion that not only did Ethyl have probable cause to file its petition, but that substantial record evidence supported the ITC's preliminary determination of material injury. Thus, Ethyl's AD/CVD petition was not objectively baseless and the alleged misrepresentations, even if made, did not taint the "core" of Ethyl's AD/CVD petition. Accordingly, the sham exception to the *Noerr-Pennington* doctrine has no application to Ethyl's petition, and Ethyl is entitled to First Amendment immunity from antitrust liability for its petition to the ITC and DOC.

Moreover, the record reveals that in 1988, Ethyl had made a request to United States Trade Representative ("USTR") that the USTR remove Indian ibuprofen from the General System of Preferences ("GSP") list — a list that contains products that are not charged duties upon

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18. The dissent has not recognized that misrepresentations, if indeed they occurred, must be *material* to be acknowledged in the *Noerr-Pennington* context, as we have established. *See supra* pp. 123-24. Even if misrepresentations had been made such that Ethyl's allegations regarding its January through June 1991 profitability were unsupported, they were not deemed material in the opinions of the Commissioners.

arrival in the United States. USTR declined to do so in 1988 because Cheminor's impact on the U.S. market was slight in 1988. App. 1316. Ethyl renewed its request in 1990 asking then that the USTR remove Indian ibuprofen from the GSP. At that time, USTR granted Ethyl's request because of Indian ibuprofen's "potential impact on U.S. producers." App. 1445. This latter action by USTR might well be inferred to have given Ethyl probable cause to seek further remedies available by petition from the United States Government to support Ethyl's continued concern about Indian ibuprofen.[19]

In determining Ethyl's "objective basis for filing its petition," we also cannot ignore the fact that Ethyl posited a "threat" of material injury in addition to its present material injury. The ITC, as we have discussed, considered only Ethyl's present material injury, which we have held provided Ethyl with a sufficient objective basis for its AD/CVD petition, satisfying the Supreme Court's test. We recognize, however, that had the ITC made a contrary finding as to actual material injury, it would have been obliged to address Ethyl's claimed "threat" to its ibuprofen sales. If that endeavor had been necessary, the ITC determination of "threat" would not have required any consideration by the ITC of the domestic industry's (*i.e.*, Ethyl's) present profitability, 19 U.S.C. § 1677(7)(F)(i)(I)-(F) — the one issue to which Cheminor has called attention. Hence, even if the ITC had not found present material injury based upon Ethyl's claims, the threat of material injury

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19. Again, the dissent fails to recognize that the USTR's actions gave Ethyl probable cause to file its AD/CVD petition.

stemming from Indian subsidization and dumping at less than fair value in the future would have more than sufficed to justify Ethyl's petition. Significantly, Cheminor failed to adequately rebut Ethyl's threatened injury.

V.

Because we hold that Cheminor has not satisfied the first step of *PRE's* sham exception to the *Noerr-Pennington* doctrine, we have no need to address the question of whether Ethyl had a subjective intent to abuse government process.[20]

VI.

While the district court did not err in granting *Noerr-Pennington* immunity to Ethyl, it did err in dismissing Cheminor's state law claims on the ground that the court lacked subject matter jurisdiction. Both Ethyl and Cheminor agree that the District Court had subject matter jurisdiction over Cheminor's state law claims under 28 U.S.C. § 1332 because the parties are diverse[21] and the amount in controversy exceeded $75,000. However, Ethyl urges us to

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20. Cheminor requested discovery from Ethyl regarding issues of Ethyl's intent. Discovery motions were pending at the time the district court granted Ethyl's motion for summary judgment. In light of our affirmance of the District Court's opinion on the ground that Ethyl had an objective basis to file its petition, discovery issues as to Ethyl's subjective intent are neither relevant nor material.

21. The complaint states that Cheminor Drugs is an Indian company; that Reddy-Cheminor is a New Jersey corporation; and that Ethyl is a Virginia corporation.

affirm dismissal of Cheminor's state law claims on another ground, namely, that Ethyl is entitled to *Noerr-Pennington* immunity for the state claims that Cheminor has asserted, in the same fashion as *Noerr-Pennington* applies to the federal antitrust claims.

Specifically, Cheminor has alleged tort claims under New Jersey common law for malicious prosecution, tortious interference with contract, tortious interference with prospective economic advantage, and unfair competition. Although New Jersey has not yet decided whether the *Noerr-Pennington* doctrine "extends beyond antitrust law to tort liability," *Snyder v. American Ass'n of Blood Banks,* 144 N.J. 269, 296, 676 A.2d 1036 (1996), we have been presented with no persuasive reason why these state tort claims, based on the same petitioning activity as the federal claims, would not be barred by the *Noerr-Pennington* doctrine.

Indeed, at least two New Jersey District Courts have held that entry of summary judgment for a defendant on *federal* antitrust claims requires that summary judgment be entered for the defendant on *state* antitrust claims. *Inter-City Tire & Auto Ctr., Inc. v. Uniroyal, Inc.,* 701 F.Supp. 1120, 1124-25 (D.N.J.1988), *aff'd,* 888 F.2d 1380 (3d Cir.1989); *Regency Oldsmobile, Inc. v. General Motors Corp.,* 723 F.Supp. 250, 270 (D.N.J.1989). We are persuaded that the same First Amendment principles on which *Noerr-Pennington* immunity is based apply to the New Jersey tort claims. *See Brownsville Golden Age Nursing Home, Inc. v. Wells,* 839 F.2d 155, 159-60 (3d Cir.1988) (Sloviter, J.) (holding that *Noerr-Pennington*

immunity precludes tort liability for reporting nursing home violations to government authorities under Pennsylvania law);[22] *see also Whelan v. Abell*, 48 F.3d 1247, 1254

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22. Although the dissent argues that *Brownsville* did not "extend the *Noerr-Pennington* doctrine to state or common law claims," Dissent at 134, the court in *Brownsville* did in fact rely on several *Noerr* doctrine cases to support its holding rejecting a cause of action for malicious interference with business relations. In *Brownsville*, the court stated:

> Two lines of cases support the *Sierra Club [v. Butz*, 349 F.Supp. 934 (N.D.Cal.1972)*]* decision and that which we uphold here: the defamation cases . . . and the *Noerr-Pennington* cases teaching that the collusive use by competitors of legislative, administrative, or judicial process does not, without more, give rise to an anti-trust violation, *see Eastern R.R. Conference v. Noerr Motor Freight*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972).

*Brownsville*, 839 F.2d at 160 (underlining added). The court went on to cite to several relevant *Noerr* cases:

> In numerous cases, the courts have rejected claims seeking damages for injuries allegedly caused by the defendants' actions directed to influencing government action. *See, e.g., State of Missouri v. National Organization of Women*, 620 F.2d 1301, 1317 (8th Cir.), *cert. denied*, 449 U.S. 842, 101 S.Ct. 122, 66 L.Ed.2d 49 (1980) (boycott campaign of NOW against states not ratifying the ERA was neither tortious nor

(Cont'd)

(D.C.Cir.1995) ("[I]t is hard to see any reason why, as an abstract matter, the common law torts of malicious prosecution and abuse of process might not in some of their applications be found to violate the First Amendment") (District of Columbia law); *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056, 1059 (9th Cir.1998) (Washington state antitrust law covered by *Noerr-Pennington*). We thus will affirm summary judgment for Ethyl on those claims as well as on the federal claims.[23]

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(Cont'd)

> prohibited by the Sherman Act because 'the right to petition is of such importance that it is not an improper interference even where exercised by way of a boycott'); *Protect Our Mountain Environment, Inc. v. District Court*, 677 P.2d 1361, 1369 (Colo.1984) (*Noerr-Pennington* analysis applicable to suit for abuse of process and civil conspiracy); *Rudoff v. Huntington Symphony Orchestra, Inc.*, 91 Misc.2d 264, 397 N.Y.S.2d 863 (N.Y.Sup.1977) ('public policy dictates that the tort of interference not be extended to those situations where a citizen petitions an agency of his government'); *Bledsoe v. Watson*, 30 Cal.App.3d 105, 106 Cal.Rptr. 197 (Ct.App.1973) ('the benefit to the public interest in allowing free challenges to public expenditures that may circumvent the electoral process outweighs any detriment that may result to private contracting parties from such challenges'). Brownsville has neither distinguished these cases nor cited any authority to support its underlying action. . . .
>
> *Id.*

23. After the district court improperly dismissed the state claims in this action, Cheminor refiled its common law state claims

(Cont'd)

*Appendix A*

VII.

We will affirm the District Court's judgment of February 5, 1998, which granted Ethyl's motion for summary judgment.

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(Cont'd)
in New Jersey state court. Ethyl removed that case to federal court. The District Court administratively dismissed this second-filed case pending the outcome of this appeal. Because we are affirming the District Court's judgment in the instant case and are holding that *Noerr-Pennington* applies to the state law claims, those claims would be subject to a *res judicata* defense. Fed.R.Civ.P. 8(b).

*Appendix A*

SLOVITER, Circuit Judge, dissenting.

I dissent from the decision of the majority for two reasons. First, I believe the majority errs as a matter of law in its reading of the sham exception to the *Noerr-Pennington* doctrine, and thereby diminishes by judicial interpretation the scope of the Sherman Act, a seminal congressional enactment. Second, I believe the facts of record are sufficient to withstand summary judgment.

I will not repeat in detail the historical facts outlined by the majority. For our purposes, it is sufficient to recognize that appellant Cheminor, an Indian manufacturing company, began exporting bulk ibuprofen for sale in the United States in 1988, which would have created competition for appellee Ethyl, who was at that time the only U.S. manufacturer of bulk ibuprofen.

Ethyl began taking steps to impede Cheminor's entry into the U.S. market. In addition to filing a petition with the U.S. Trade Representative (USTR), seeking to remove Indian ibuprofen from the list of eligible articles, which was ultimately successful effective July 1, 1991, it also filed an anti-dumping (AD) and countervailing duty (CVD) petition with the United States International Trade Commission (USITC) and the United States Department of Commerce (USDOC) accusing Cheminor of receiving generous subsidies from the Indian government and selling bulk ibuprofen on the U.S. market at below market prices. The USITC, which has only 45 days to make a preliminary determination whether, based on the best information available at the time, there is a reasonable indication of

material injury to a domestic industry, or threat thereof, by reason of the imports under investigation, *see* 19 U.S.C. § 1671b(a), made a preliminary determination on September 16, 1991, that there was sufficient evidence of material injury to the domestic market to justify taking corrective action against Cheminor. On December 13, 1991, the USDOC preliminarily determined that the Indian government had been subsidizing Cheminor in the amount of 43.71%. As a result of these two determinations, the USITC and/or USDOC required Cheminor's exclusive distributor, Flavine International ("Flavine"), to pay 43.71% duties on any Cheminor ibuprofen imported.

In response to this significant additional cost, Flavine canceled all orders for bulk ibuprofen. This effectively forced Cheminor out of the U.S. ibuprofen market. Cheminor notified the USITC that it would be withdrawing from the market. Only after Cheminor withdrew did Ethyl voluntarily withdraw its USITC petition.

Cheminor then filed this lawsuit against Ethyl. The District Court granted Ethyl's motion for summary judgment on the antitrust claims on the ground that Ethyl was immune from suit under the First Amendment and the *Noerr-Pennington* doctrine. It dismissed Cheminor's state law claims under 28 U.S.C. § 1367(c), refusing to exercise supplemental jurisdiction as a matter of discretion.

*Appendix A*

I

## *LEGAL ISSUE: TREATMENT OF FRAUD UNDER NOERR-PENNINGTON*

Under the majority's decision, even a party who has committed blatant and intentional fraud and misrepresentation in a judicial or administrative proceeding is entitled to the protection that the *Noerr-Pennington* doctrine affords from suit under the antitrust laws. I do not believe that *Noerr-Pennington* goes as far as to cover abuse of process; I do not believe that it should.

The rationale given by the Supreme Court for its holding in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws," was the dissimilarity between an agreement to lobby for legislation and an agreement to price-fix or boycott, *id.* at 137, 81 S.Ct. 523, the concern about impairing the ability of persons to make known their wishes to their legislators, *id.*, the unwillingness to apply the Sherman Act to political activity, *id.*, and the First Amendment protection of the right to petition, *id.* at 137-38, 81 S.Ct. 523. This holding was extended to attempts to influence the executive branch, specifically the Secretary of Labor, in *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). Yet another extension was added in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11, 92 S.Ct.

609, 30 L.Ed.2d 642 (1972), when the Court ruled that citizens' attempts to influence administrative agencies or courts similarly may not engender antitrust liability. The majority relies upon this doctrine in holding that Cheminor cannot base its antitrust claims on Ethyl's attempts to influence the USITC and USDOC.

However, the *Noerr-Pennington* exception to the antitrust laws is not unlimited. The Court in *Noerr* made that clear when it stated, "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationship of a competitor and the application of the Sherman Act would be justified," thereby describing what has come to be known as the "sham" exception. 365 U.S. at 144, 81 S.Ct. 523.

Thereafter, in holding that because of the sham exception the antitrust laws applied to the conduct of highway carriers who allegedly engaged in concerted action to institute state and federal proceedings to resist and defeat applications by competitive highway carriers to acquire, transfer or register those rights, the Supreme Court held that "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *California Motor Transport,* 404 U.S. at 513, 92 S.Ct. 609. If the activity were proven, the antitrust laws would apply.

Thus, I believe, and there are cases so holding, that the "sham" exception to *Noerr-Pennington* immunity from the antitrust laws includes at least two separate and independent

grounds for holding that a particular litigant is not immune from antitrust liability: (1) that the litigation was objectively baseless, and (2) that the litigation was based on knowing and material misrepresentations. The District Court never considered whether Ethyl's AD/CVD petition might be a sham based on the second ground. The majority holds this was not error, and in doing so relies on the Supreme Court's most recent decision on this subject.

In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993) (PRE), the Court, in "defin[ing] the 'sham' exception to the doctrine of antitrust immunity first identified in [*Noerr*] as that doctrine applies in the litigation context," held that "litigation cannot be deprived of immunity as a sham unless the litigation is objectively baseless." *Id.* at 51, 113 S.Ct. 1920. The majority reads that as holding that "objective baselessness" is the only exception to *Noerr-Pennington*. However, nothing in *PRE* repudiated the holding in *California Motor Transport*. Rather, the *PRE* Court expressly reserved the question whether and to what extent the test it announced would apply in the event that the litigation involved misrepresentations or other highly disfavored conduct. It stated:

> In surveying the "forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations," we have noted that "unethical conduct in the setting of the adjudicatory process often results in sanctions"

> and that "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *California Motor Transport,* 404 U.S., at 512-513 [92 S.Ct. 609]. We need not decide here whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations.

*PRE,* 508 U.S. at 61 n. 6, 113 S.Ct. 1920 (citations omitted).

The majority's decision to disregard the facts that Cheminor alleges Ethyl misrepresented is contrary to the position of the two other courts of appeals that have considered this issue. Both of these courts read *PRE* to preserve a fraud exception to antitrust immunity, although they vary in their interpretation of that exception. *See Whelan v. Abell,* 48 F.3d 1247, 1254-55 (D.C.Cir.1995); *Kottle v. Northwest Kidney Centers,* 146 F.3d 1056, 1060 (9th Cir.1998), *cert. denied,* __ U.S. __, 119 S.Ct. 1031, __ L.Ed.2d __ (1999).

For example, the Court of Appeals for the District of Columbia has held that litigation that is based on misrepresentations does not enjoy immunity either under *Noerr-Pennington* or under the First Amendment. In *Whelan,* the district court had dismissed the antitrust complaint on the grounds that the defendants were immune from liability under *Noerr-Pennington* because the litigation they pursued was not objectively baseless. *See* 48 F.3d at 1253. In reversing that decision, the appellate court agreed with the plaintiffs that, even if the litigation was not

baseless, the defendants were not entitled to immunity if they made deliberately false and material representations in the course of that litigation. The court reasoned that because *Noerr-Pennington* immunity is based, at least in part, on respect for the First Amendment right to petition for redress of grievances, and because "[h]owever broad the First Amendment right to petition may be, it cannot be stretched to cover petitions based on known falsehoods," it followed that *Noerr-Pennington* did not immunize the defendants from liability based on their misrepresentations. *Id.* at 1254-55.

A fraud exception to *Noerr-Pennington* in the litigation context was also recognized in *Kottle,* where the Ninth Circuit stated, "[I]n the context of a judicial proceeding, if the alleged anticompetitive behavior consists of making intentional misrepresentations to the court, litigation can be deemed a sham if 'a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy.' " 146 F.3d at 1060 (quoting *Liberty Lake Inv., Inc. v. Magnuson,* 12 F.3d 155, 158-59 (9th Cir.1993)).

The majority relegates these cases to a footnote for the proposition that the misrepresentation must be material, without acknowledging that the Ninth and District of Columbia Courts of Appeals, unlike it, accept misrepresentation as an independent prong of the sham exception to *Noerr-Pennington.* By thus conflating the concepts of "material" and "objectively baseless," the majority ignores the risk that a party will intentionally use fraud and misrepresentation to transform a claim that is

otherwise weak and unlikely to prevail, although not "objectively baseless," into one that succeeds.

Given the cited appellate authority, it is inexplicable to me why the majority has chosen to rely for its precedent on the district court decision in *Music Center S.N.C. DiLuciano Pisoni & C. v. Prestini Musical Instruments Corp.*, 874 F.Supp. 543 (E.D.N.Y.1995). In that case, the court refused to permit plaintiffs to proceed to discovery in an antitrust claim based on material misrepresentations without first establishing a colorable claim that the challenged litigation was objectively baseless.

Many of the arguments made by the majority are effectively answered in *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240 (9th Cir.1982), a case in which the court reversed the summary judgment granted to defendant trucking companies and their rate bureau, who had filed protests with the Interstate Commerce Commission with regard to the plaintiff's shipping rates. The Court of Appeals rejected the defendants' attempts to cloak themselves with the mantle of *Noerr-Pennington* immunity, noting that, unlike in the political arena, immunizing defendants from liability based on misrepresentations made in an adjudicatory context could undercut the effectiveness of the adjudicatory body. It explained:

> There is an emphasis on debate in the political sphere, which could accommodate false statements and reveal their falsity. In the adjudicatory sphere, however, information

> supplied by the parties is relied on as accurate for decision making and dispute resolving. The supplying of fraudulent information thus threatens the fair and impartial functioning of these agencies and does not deserve immunity from the antitrust laws.

*Id.* at 1261.

To follow further the *Clipper* court's distinction between petitioning the legislature and petitioning a court, I quote from other pertinent language in the opinion:

> Adjudicatory procedures will not always ferret out misrepresentations. Administrative bodies and courts . . . rely on the information presented by the parties before them. They seldom, if ever, have the time or resources to conduct independent investigations. The recognition, however, of a private right of action based on the fraudulent misrepresentation, might be sufficient incentive to induce parties not to fraudulently misrepresent facts.

*Id.* at 1262. Moreover, the *Clipper* court, like the court in *Whelan*, noted that the First Amendment does not protect such false petitioning:

> There is no first amendment protection for furnishing with predatory intent false information to an administrative or adjudicatory body. The first amendment has not been

> interpreted to preclude liability for false statements.

*Id.* at 1261.

Unlike the majority, I conclude that the District Court erred in recognizing only a single exception to *Noerr-Pennington* immunity based on "objective baselessness," and would remand to that court for further consideration.

II

## *IS THERE SUFFICIENT FACTUAL BASIS OF FRAUD AND MISREPRESENTATION TO WITHSTAND SUMMARY JUDGMENT?*

Cheminor has raised sufficient questions of fact to survive summary judgment under the "sham" exception as I have delineated it. Cheminor alleges that when Ethyl filed the AD/CVD petition, it knew it would not be able to establish all of the elements of an antidumping or countervailing duty claim, and intentionally and materially misrepresented its financial condition in order to overcome this difficulty. It alleges that Ethyl misrepresented, *inter alia*, (1) Ethyl's profits and costs,[1] (2) the customers Ethyl allegedly lost to Cheminor, and (3) specific sales Ethyl allegedly lost to Cheminor. Because Cheminor has

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1. In addition to its contention that Ethyl misrepresented data for the first six months of 1991, Cheminor also contends that Ethyl "intentionally and wrongfully underreported its profits to the ITC by $1.5 million dollars (over three years)" and that Ethyl misrepresented its 1990 profits. Appellants' Br. at 14, 16.

submitted some evidence to support these allegations, I, like the majority, must assume that the statements Cheminor alleges were false are, in fact, false. I conclude that these misrepresentations were sufficiently material to bring them within the sham exception to *Noerr-Pennington* immunity.

To prevail in the AD/CVD case, Ethyl had to show that Cheminor received government subsidies, it sold the product at less than fair value, there was material injury to the domestic industry, and this injury was by reason of Cheminor's exports. A failure to show any one of these elements would have defeated Ethyl's claim. A misrepresentation was thus material to the extent that the truth would have tended to disprove the existence of any one of the elements.

Cheminor contends that Ethyl's misrepresentations were material to the USITC's determination that material injury to the domestic industry probably had occurred. In making that determination, the USITC must by statute consider "(I) the volume of the imports of the subject merchandise, (II) the effect of the imports of that merchandise on prices in the United States for domestic like products, and (III) the impact of imports of such merchandise on domestic producers of domestic like products. . . ." 19 U.S.C. § 1677(7)(B)(I). Further, in assessing the impact imports have had on domestic producers, the USITC must consider "all relevant economic factors which have a bearing on the state of the industry in the United States," which in this case was Ethyl. 19 U.S.C. § 1677(7)(C)(iii). The USITC was specifically directed to consider:

> (I) actual and potential decline in [Ethyl's] . . . sales [and] profits, . . .
>
> (II) factors affecting [Ethyl's] prices,
>
> (III) actual and potential negative effects on [Ethyl's] cash flow, . . .
>
> (IV) actual and potential negative effects on [Ethyl's] existing development and production efforts . . . , and
>
> (V) . . . the magnitude of the margin of dumping.

*Id.* The misrepresentations Cheminor alleges Ethyl made directly concern Ethyl's sales, profitability, prices, and cash flow — three of the five statutorily-mandated indicia of injury. By law, they were thus material to the USITC's decision making.

Moreover, as even the majority admits, the USITC actually "relied . . . in part on Ethyl's representations of its financial condition" in determining that Ethyl's application justified imposing punitive tariffs on Cheminor. The USITC stated in its "Views of the Commission":

> The financial trends provide a reasonable indication of present material injury. For example . . . the industry [Ethyl's] profitability (as measured by profit-to-sales ratio) declined substantially from the beginning to the end of the investigatory period, despite an increase in 1989 from the 1988 level.

*Appendix A*

> Confidential information concerning other factors, such as apparent domestic consumption and market share, further provide a reasonable indication of present injury.

App. at JA 2097 (footnote omitted).

The fact that the USITC also relied on other factors, such as Cheminor's market share, in reaching its determination cannot disprove the materiality of the misrepresentations. Neither Ethyl nor the majority have suggested any reason to believe that the USITC would not have reconsidered its decision had it known that Cheminor's financial condition was improving. The USITC might have decided that strong evidence of a financially healthy domestic industry outweighed any data suggesting that Cheminor's market share was increasing. Ethyl's misrepresentations deprived the USITC of that opportunity, undermining the legitimacy of its decision making process.

Nor can Ethyl refute the materiality of the alleged misrepresentations by claiming that the USITC could have based its determinations on the threat of material injury. Ethyl admits that neither the District Court nor the USITC considered whether the evidence it submitted established a colorable claim of threat of harm. The fact that the misrepresentations might not have been material to a determination the USITC concededly did not make says little about whether the same misrepresentations affected the determination it concededly did make. Similarly, the USTR's decision to remove Indian ibuprofen from the GSP in 1990 is irrelevant to the determination whether Ethyl's alleged misrepresentations affected the USITC's decision.

*Appendix A*

The majority, apparently in an attempt to negate materiality, notes that Acting Chairman Anne Brunsdale, writing separately, "did not rely on Ethyl's assertions of decreased profits" in reaching her decision. An individual Commissioner's views do not in any way indicate that the misrepresented facts were not material to the other Commissioners or to the Commission's decision. In any event, even Acting Chairman Brunsdale said she found Ethyl's financial information "useful in determining whether the injury resulting from any dumping and subsidization is material." App. at JA 2105.

The majority's suggestion that the alleged misrepresentations are not material because "they were deemed to be not material by the ITC" is even less persuasive. The Commissioners had not learned of the falsity of Ethyl's representations at the time they reached their decision and thus they had no opportunity to judge their materiality. I can only assume that the majority means to say that the Commissioners did not deem Ethyl's profitability figures to be material in reaching a decision. As I explain above, I find this interpretation of the Commissioners' actions untenable.

Of more concern is the majority's apparent belief that the issue turns on whether Ethyl had probable cause to file its petition. As I have explained, a party's use of material misrepresentations in filing an action is a separate and independent ground for denying *Noerr-Pennington* immunity.

Finally, I note that the majority extends *Noerr-Pennington* immunity beyond the antitrust context, and holds it also governs Cheminor's state common law claims.

This court has not previously so held, and I believe we should not expand the scope of *Noerr-Pennington* immunity to cover claims of any variety — common law or statutory, federal or state — without significantly more consideration than the majority devotes to this issue. *See Whelan*, 48 F.3d at 1253-55 (identifying concerns raised by the application of *Noerr-Pennington* defense to common law claims without deciding whether such application is mandated by the First Amendment).

I see no need to engage in a monologue on that issue in the posture of this case. I do note that the case the majority refers to for its expansion of the *Noerr-Pennington* doctrine, *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, (3d Cir.1988), which (perhaps not coincidentally) I authored, did not purport to extend the *Noerr-Pennington* doctrine to state or common law claims; it merely held that "action designed to bring a facility's noncompliance with applicable regulations to the attention of the appropriate authorities" cannot form the basis of a damage action, and drew analogies to cases rejecting claims based on petitioning activity. That can hardly be used as support for the majority's very different determination that fraudulent action, designed to elicit administrative action, is immune from any liability, whether under federal, state, statutory or common law.

Whether Cheminor's state law claims fall within an exception to the *Noerr-Pennington* doctrine turns on precisely the same considerations as the determination whether its federal claims fall within that exception. Because I disagree with the majority's conclusion that Ethyl is entitled to immunity from Cheminor's antitrust claims and its state law claims, I respectfully dissent.

## APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MARCH 1, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

*No. 98-6004*

CHEMINOR DRUGS, LTD.;
REDDY-CHEMINOR, INC.,

*Appellants*

v.

ETHYL CORPORATION;
JOHN DOES 1 THROUGH 10

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 94-cv-04371)
District Judge: Honorable Joseph A. Greenaway, Jr.

Present: SLOVITER, GARTH, and MAGILL,* *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel October 30, 1998.

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* Hon. Frank J. Magill, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

*Appendix B*

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered February 9, 1998, be, and the same is hereby affirmed. Costs taxed against appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ P. Douglas Sisk
Clerk

Dated: March 1, 1999

## APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED FEBRUARY 5, 1998

**CHEMINOR DRUGS, LTD. and Reddy-Cheminor, Inc., Plaintiffs,**

**v.**

**ETHYL CORPORATION and John Does 1 through 10, Defendants.**

**No. Civ. 94-4371 JAG.**

United States District Court,
D. New Jersey.

Feb. 5, 1998.

* * *

### OPINION

GREENAWAY, District Judge.

This matter comes before the Court on the motion for summary judgment of Lowenstein, Sandler, Kohl, Fisher & Boylan, attorneys for defendant Ethyl Corporation ("Ethyl").

*PRELIMINARY STATEMENT*

Cheminor Drugs, Ltd. ("Cheminor") and its recently-formed subsidiary, Reddy-Cheminor, Inc. ("Reddy-

Cheminor"), allege that Ethyl is liable under theories of antitrust, malicious prosecution, abuse of process, tortious interference and unfair competition. On July 31, 1991, Ethyl filed a petition (the "Petition")[1] with the Department of Commerce ("DOC") and the United States International Trade Commission ("USITC"), requesting the imposition of anti- dumping and countervailing duties ("AD/CVD") on imports of bulk ibuprofen from India. The Petition, which is at the heart of this litigation, alleges that from 1988 through 1991, the Government of India subsidized Cheminor, an Indian company[2], in excess of 76% of the export value of its bulk ibuprofen. Cheminor 12G ¶ 18.[3] The Petition also alleges that from 1988 through 1991 Cheminor dumped bulk ibuprofen into the U.S. market at less than fair value ("LTFV"). *Id.* at ¶ 19. Cheminor does not dispute either that it received subsidies or dumped ibuprofen in the U.S. market. Cheminor does assert, however, that Ethyl could not have prevailed on its Petition because it could not have proven that it was materially injured by the sale of the imported product. Cheminor also claims that Ethyl wrongfully filed and prosecuted a Petition,

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1. The Petition is attached as Exhibit A to the Certification of Will E. Leonard ("Leonard Certif."), submitted in support of Ethyl's motion.

2. Reddy-Cheminor is a New Jersey corporation and Ethyl is a Virginia corporation.

3. References in the form "Cheminor 12G at ¶ __" are to Cheminor's Statement of Undisputed Material Facts, submitted pursuant to then General Rule 12G, now amended Local Civil Rule 56.1.

replete with intentional misrepresentations,[4] causing Cheminor to withdraw from the U.S. market and lose sales.

Ethyl filed the instant summary judgment motion and denied making any misrepresentations. Assuming *arguendo*, that Ethyl somehow misled the USITC about its financial condition, the issue presented, according to Ethyl, is whether plaintiffs can establish that the entire petitioning process was "objectively baseless". In short, Ethyl asserts that the record demonstrates that it had probable cause to file the Petition; as such, it is immune from antitrust liability pursuant to the First Amendment and the Noerr-Pennington doctrine. In the alternative. Ethyl claims that its legitimate petitioning of its government not only entitles it to First Amendment protection but also defeats each of plaintiffs' individual claims — i.e., malicious prosecution. abuse of process, tortious interference, unfair competition and violations of federal and state antitrust laws.

## *FACTS*

Ethyl manufactures numerous chemicals, including bulk ibuprofen. Ethyl began manufacturing this anti-

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4. Plaintiffs' Amended Complaint, entered on the docket on June 19, 1995, alleges malicious prosecution, abuse of process, tortious interference, unfair competition and state and federal antitrust claims. The Amended Complaint, however, does not include a specific cause of action for misrepresentation. *See* Hansen Certif. Ex. J (references in the form Hansen Certif. are to the Certification of Timothy G. Hansen, submitted by defendants in support of this motion).

inflammatory drug in 1978. Turnipseed Certif. ¶ 2.[5] In May 1984, the FDA gave ibuprofen manufacturers, Upjohn Co. ("Upjohn") and Boots Co. USA, Inc. ("Boots")[6], its approval for a two and one-half year period of marketing exclusivity to sell over-the-counter ("OTC") ibuprofen in 200 milligram dosages. *Id.* at ¶ 5. In September 1986, the period of exclusivity granted to Upjohn and Boots to market OTC ibuprofen expired and new ibuprofen products flooded the market. *Id.* As of June 1990, the FDA approved 27 companies to sell ibuprofen in one or another of several dosage forms. *Id.*[7]

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5. References in the form "Certif. ¶ __" are to the Certification of Max Turnipseed, former Director of International Trade and Regulatory Affairs for Albermarle Corporation, submitted by Ethyl in support of this motion. On February 28, 1994 Ethyl transferred the assets of its specialty chemical businesses, including the bulk ibuprofen business, to Albermarle and declared the stock of Albermarle Corporation as a dividend to Ethyl's shareholders. From August 1, 1991 through February 28, 1994, Turnipseed was the Director, International Trade and Regulatory Affairs, for Ethyl. Prior to that, Turnipseed held various positions at Ethyl and had been working there since November 1966.

6. Upjohn was a licensee of Boots, the U.S. subsidiary of Boots P.L.C., a British company. Upjohn first introduced ibuprofen to the United States market as a prescription drug in 1974. Turnipseed Certif. ¶ 1.

7. The passage of the Drug Price Competition and Patent Term Restoration Act of 1984, known as the Waxman-Hatch Act, also aided the explosive growth in the domestic generic pharmaceutical industry. The Act omitted the requirement that generic pharmaceutical companies had to prove anew the safety and efficacy of a drug already approved in a New Drug Application ("NDA"), filed originally by the inventor of the drug. Turnipseed Certif. ¶ 1.

*Appendix C*

In 1987, bulk ibuprofen manufactured in India began entering the U.S. market. In 1988, Cheminor received FDA approval to sell its bulk ibuprofen to tablet manufacturers in the U.S. From 1988 through 1991, Cheminor was the only Indian manufacturer, selling bulk ibuprofen to formulators in the U.S., that had secured appropriate FDA approval. Turnipseed Certif. ¶ 6.[8]

Ethyl contends that from the time Cheminor entered the U.S. market with commercial quantities of bulk ibuprofen in 1988, it experienced remarkable success in gaining both overall volume as well as market share. The success occurred primarily as a result of Cheminor's pricing strategy of selling bulk ibuprofen at LTFV. *Id.* at ¶ 12. Ethyl also contends that it learned that Cheminor had been benefitting from numerous subsidies front its own government. *Id.* at ¶ 16. Further, by 1991, Ethyl believed Cheminor was receiving subsidies from the Indian government in excess of 76% of the bulk ibuprofen's export value. *Id.* According to Ethyl, ¶ of the Cheminor went from importing 57,000 kilograms in 1988 to importing 200,000 kilograms in the first six months of 1991. *Id.* at ¶ 7. This growth represented an increase in Cheminor's U.S. market share from 2.19% in 1988 to 11.19% for the first six months of 1991. *Id.* at ¶ 10.

In 1988, based on Ethyl's belief that Cheminor was receiving substantial subsidies and that its sales were LTFV,

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8. Cheminor had an exclusive distribution agreement in the U.S. with Flavine International, pursuant to which Cheminor would supply all the bulk ibuprofen that Flavine could sell. Cheminor 12G at ¶ 1.

Ethyl filed a petition with the Chairman of the Generalized System of Preferences ("GSP") Subcommittee. Office of the U.S. Trade Representative, asking it to "withdraw GSP eligibility for duty-free treatment on ibuprofen imports from India." Turnipseed Certif. at Ex. C. Because bulk ibuprofen was on the list of eligible articles under the GSP program. Cheminor — unlike the foreign importers (and competitors) from the U.K., Japan and Spain — did not have to pay any duty on its export of bulk ibuprofen to the U.S. The President of the United States denied Ethyl's request.[9] *Id.* ¶ 21 and Ex. D. On May 19, 1989, Turnipseed received a letter from the Office of the United States Trade Representative ("USTR"), explaining that the USTR denied the Petition because "[i]mports from GSP countries comprise only two percent of the U.S. market. Consequently, the USITC determined that removing ibuprofen from India from the list of eligible articles under GSP would have little [effect.]" *Id.* However, imports from India continued to increase substantially during 1989-1990. Thus, in 1991, Ethyl filed a renewed request with the USITC asking that the U.S. withdraw ibuprofen imports from India from the GSP eligibility list. The USITC granted this request, effective July 1, 1991. *Id.* at 27.

The U.S. government's decision to remove bulk ibuprofen from India from GSP eligibility did not obviate Ethyl's concern that Cheminor would continue to use the Indian government's subsidization it was enjoying at home

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9. The Office of the U.S. Trade Representative is under the auspices of the Executive Office of the President. Turnipseed Certif. Ex. D.

to dump bulk ibuprofen in the U.S. market. Ethyl Brief at 5[10]. On July 31, 1991, Ethyl filed an AD/CVD Petition with the DOC and the USITC[11]. Ethyl's Petition alleged that ibuprofen from India was being sold in the U.S. at LTFV margins of 34% to 39%, Petition at 9, and that Cheminor was benefitting from over thirteen separate subsidies from the Indian government, amounting to more than 76% of the total export value. *Id.* at 18-34. Ethyl also alleged that Cheminor's continued practice of dumping subsidized bulk ibuprofen into the U.S. "[h]as caused and is causing material injury to petitioner and threatens it with further injury." *Id.* at 34.

Upon the filing of the Petition, the DOC investigated whether bulk ibuprofen from India was sold in the U.S. at LTFV and whether it was subsidized by the Indian government. The USITC investigated whether Ethyl was materially injured. or threatened with material injury, as a result of the dumped and subsidized imports. Ethyl 12G ¶ 27.[12] As part of its investigation, the USITC asked Ethyl

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10. "Ethyl Brief" refers to Ethyl's initial brief filed in support of this motion.

11. The filing of the Petition initiated dual proceedings whereby the DOC investigated whether Cheminor had been receiving subsidies and whether it had been dumping bulk ibuprofen into the U.S. market. The USITC investigated whether or not Ethyl was being harmed by, or was threatened with material injury as a result of, bulk ibuprofen from Cheminor. Leonard Certif. ¶ 4.

12. References in the form "Ethyl 12G at __" are to Ethyl's Statement of Undisputed Material Facts, submitted pursuant to then General Rule 12G, now amended Local Civil Rule 56.1.

to complete a questionnaire. On August 13, 1991, Ethyl returned the completed questionnaire to the USITC. *Id.* ¶ 28. The USITC also sent questionnaires to Flavine and tablet manufacturers. *Id.* at ¶ 29.[13] The DOC issued questionnaires to Cheminor as part of its AD and CVD investigations. *Id.* at ¶¶ 32 & 35.

Cheminor claims that Ethyl knowingly misrepresented information to the USITC in its Petition and responses to the questionnaires. Specifically, Cheminor alleges that Ethyl intentionally: (1) failed to disclose a product recall that reduced its 1990 profits by at least $1.2 million. Cheminor 12G ¶ 105; (2) reduced its first half-year 1991 profits by $2.7 million by including research and development and manufacturing costs for S+ ibuprofen — as opposed to ibuprofen — a product which was not being imported from India in 1991 and therefore was not being investigated by the USITC. *Id.* at ¶¶ 88-93; and (3) reduced its first half-year 1991 profits by another $2.1 million by including future environmental and expansion costs. *Id.* at ¶¶ 74-87.

On September 16, 1991, the USITC issued its preliminary determination (the "USITC Report"), concluding that there was a reasonable indication that the ibuprofen industry in the U.S. had been materially injured by reason of bulk ibuprofen imports that the Government of India allegedly, subsidized these imports, and Cheminor

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13. During oral argument, Mr. Miller, counsel for the plaintiffs, acknowledged that Cheminor and the Government of India also filled out questionnaires for the USITC. Tr. at 17 ("Tr. at __" refers to the transcript of proceedings before this Court on August 22, 1997).

sold the bulk ibuprofen imports in the U.S. at LTFV. Leonard Certif. ¶ 17.

The USITC Report cited two separate and distinct indications of material injury: (1) that Ethyl's "financial trends" demonstrated material injury; and (2) that "other factors, such as apparent domestic consumption and market share, further provide a reasonable indication of present injury." USITC Report at 16.[14] The USITC began its injury analysis by identifying the factors it would consider in making its injury determination. The factors employed included domestic consumption, production, capacity, capacity utilization, shipments, inventories, employment, financial performance, capital investment and research and development efforts. USITC Report at 15-16. In articulating the bases for its conclusion that Ethyl was being materially injured, the USITC used the same reasoning it had initially set forth in the Report. *Id.* at 16.[15]

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14. The USITC Report, along with the Additional Comments of the Chairman and the information gathered during the preliminary investigation, are attached as Exhibit G to the Leonard Certification.

15. In addition, in the section of the USITC Report entitled "Additional Views of Acting Chairman Anne E. Brunsdale", Chairman Brunsdale bases her conclusion of material injury on the following three factors: (1) "the subject imports are quite substitutable" for domestic bulk ibuprofen. (2) "the alleged dumping and subsidy margins in these investigations are quite high" and (3) the share of U.S. bulk ibuprofen market accounted for by the Indian imports is not small enough to ensure that there is no material injury. USITC Report at 26-27.

*Appendix C*

Cheminor claimed that the USITC's preliminary determination had little significance because: (1) respondents had little or no input into the questionnaire the USITC used for its preliminary determination; and (2) the USITC had little or no time in its preliminary investigation to probe the accuracy of the information that the domestic industry submitted and must, in preliminary determinations, resolve all doubts in favor of the petitioner. Cheminor 12G ¶¶ 136-37.[16]

On August 26, 1991, the DOC announced its determination to initiate the AD and CVD investigations and issued its preliminary CVD questionnaire to Cheminor and the Government of India. Leonard Certif. ¶ 22. On December 13, 1991, the DOC made its preliminary CVD determination in favor of Ethyl, finding a subsidy in the amount of 43.71%. *Id.* at ¶ 24 & Ex.N. Along with this preliminary determination, the DOC directed the United States Customs Service to require a cash deposit or bond for all entries of this merchandise, equal to 43.71% *ad valorem*, for bulk ibuprofen produced and exported by Cheminor. *Id.*

In a letter dated January 13, 1992, Cheminor informed the DOC of its intention to withdraw from the U.S. bulk ibuprofen market and that because of the DOC's CVD determination "all outstanding orders and letters of credit

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16. According to Cheminor, in contrast to the preliminary USITC's determinations, where all doubts are resolved in favor of the petitioner, in connection with the final injury investigation, the USITC commissioners resolve doubts in favor of the respondents concerning information petitioner supplied. Cheminor 12G ¶ 138.

for Cheminor's bulk ibuprofen were canceled by its exclusive U.S. importer, Flavine International, Inc." Leonard Certif. ¶ 25 & Ex. O. Cheminor also informed tile DOC that it would not participate in either the AD or CVD verification. *Id.* at ¶ 25.[17]

On February 27, 1992, the DOC issued its preliminary determination that imports of ibuprofen from India were being sold in the U.S. at LTFV and that there was an estimated dumping margin of 115.94%. Leonard Certif. ¶ 26.

On March 4, 1992, Ethyl informed the DOC that it was withdrawing its Petition. *Id.* at ¶ 26. Ethyl claimed that Cheminor's announcement that it was withdrawing from the U.S. market undermined Ethyl's ability to allege that bulk ibuprofen from India posed a "threat of material injury to Ethyl." Turnipseed Certif. ¶ 44. In addition, Cheminor's decision also had the practical effect of granting Ethyl more relief than it had sought by filing the Petition.[18]

Cheminor claims that Ethyl's explanations for withdrawing its Petition are implausible. Cheminor alleges

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17. A "verification" is when the DOC, in the exporting country, conducts an "onsite" inspection of all books and records to substantiate the questionnaire responses. Leonard Certif. ¶ 8.

18. The other reasons Ethyl gave in support of its decision to withdraw its Petition were: (1) that it experienced better than expected profits for the second half of 1991, due to increased sales and lower than expected environmental costs; and (2) the significant avoidance of legal fees which it would have incurred if it had prosecuted the Petition any further.

that "[w]hen Ethyl withdrew its petition, there was no assurance that Cheminor would not re-enter the United States market which assurance could have been obtained had Ethyl successfully, prosecuted its petition to a conclusion or had the Department of Commerce entered into a suspension agreement with Cheminor and/or the Indian government." Cheminor 12G ¶ 185. Cheminor claims that its announcement that it was leaving the bulk ibuprofen business could not, by itself, render moot the threat of material injury allegations in Ethyl's Petition. *Id.* at ¶ 187. Cheminor also points out that Ethyl withdrew its Petition because it believed, and was advised by counsel, that it could not show material injury and would lose the USITC case.[19]

## *DISCUSSION*

Fed.R.Civ.P. 56(e) provides for summary judgment when the moving party demonstrates that there is no genuine issue as to a material fact and the evidence establishes the moving party's entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1366 (3d Cir.1996). In making this determination, the court must draw all reasonable inferences

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19. In addition, Cheminor argues that Ethyl's claim that it decided to withdraw its Petition because of the legal fees it would have incurred is implausible because: (1) the remaining stages of the USITC case merely involved responding to a questionnaire and optional participation in further procedures; and (2) Ethyl had the option of appearing without legal counsel, as many petitioners do. Cheminor 12G ¶¶ 189-91.

in favor of the non-movant. *National State Bank v. Federal Reserve Bank of New York*, 979 F.2d 1579, 1581 (3d Cir.1992).

Once the moving party has satisfied its initial burden, the party opposing the motion must establish that a genuine issue as to a material fact exists. *Jersey Cent. Power & Light Co. v. Lacey Township*, 772 F.2d 1103, 1109 (3d Cir.1985). However, the party opposing the motion for summary judgment cannot rest on mere allegations and must instead present actual evidence that creates a genuine issue as to a material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 243, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1130-31 (3d Cir.1995); *Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 500 (3d Cir.1991) (citing *Sound Ship Building Corp. v. Bethlehem Steel Co.*, 533 F.2d 96, 99 (3d Cir.1976)); *see also Schoch v. First Fidelity Bancorporation*, 912 F.2d 654, 657 (3d Cir.1990) ("unsupported allegations in [a Plaintiff's] memorandum and pleadings are insufficient to repel summary judgment"); Fed.R.Civ.P. 56(e) (requiring non-moving party to "set forth specific facts showing that there is a genuine issue for trial.")

***Noerr-Pennington Immunity***

The so-called Noerr-Pennington doctrine "provides broad antitrust immunity for defendants who have invoked administrative and judicial processes irrespective of anti-competitive intent[.]" *Miracle Mile Associates v. City of Rochester*, 617 F.2d 18, 20 (2d Cir.1980) (citing *Eastern Railroad Presidents Conference v. Noerr Motor Freight,*

*Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965)). Thus, pursuant to Noerr-Pennington, "mere solicitation of governmental action with respect to the passage and enforcement of laws" is protected by the First Amendment and, therefore, is immune from Sherman Act liability, *Noerr*, 365 U.S. at 138; *see also Pennington*, 381 U.S. at 670 ("*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.") The broad immunity granted by the Noerr-Pennington doctrine was also extended to proceedings before administrative agencies and the courts in *California Motor Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 514, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972).[20]

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20. In *California Motor Transport Co., v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642, respondent highway carriers filed an action pursuant to Section 4 of the Clayton Act claiming that the state and federal proceedings initiated by the petitioner highway carriers against respondents amounted to "sham" litigation. Specifically, respondents alleged that petitioners instituted "state and federal proceedings to resist and defeat applications by respondents to acquire operating rights or to transfer or register those rights. These activities . . . extend to rehearings and to reviews or appeals from agency or court decisions on those matters." *Id.* at 509. Respondents claim that the real purpose of petitioners' litigation was to put "their competitors [respondents] . . . out of business". *Id.* at 511. Petitioners claimed they were protected from respondents' antitrust claims pursuant to the Noerr Pennington doctrine. *Id.* Citing to *Noerr* and *Pennington*, the Court held that "[t]he same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature and arms of the executive) and to court, (Cont'd)

The Court in *Noerr,* however, also held that immunity may not be enjoyed when the underlying litigation or solicitation of governmental action is determined to be "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." 365 U.S. at 144; *see also Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.,* 508 U.S. 49, 57, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993) ("*PRE*") (Court withheld immunity from "sham" transactions "because 'application of the Sherman Act' would be justified when petitioning activity, 'ostensibly directed toward influencing governmental action, is a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor.' ") (citation omitted).

The Court in *PRE* outlined a two-part test which defined "sham" litigation and the circumstances in which the immunity exception to the Noerr-Pennington doctrine applies:

> First, the lawsuit must be *objectively baseless* in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable

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(Cont'd)
the third branch of Government. Certainly the right to petition extends to all departments of the Government." *Id.* at 510. The Court concluded that petitioners' allegations, on their face, came within the "sham" exception articulated in the Noerr case. The case was therefore remanded for trial on respondents' antitrust claims. *Id.* at 515-16.

> outcome, the suit is immunized under Noerr, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere directly with the business relationships of a competitor," through the use [of] the governmental process — as opposed to the outcome of that process — as an anticompetitive weapon[.] This two-tiered process requires the plaintiff to disprove the challenged lawsuit's legal viability before the court will entertain evidence of the suit's economic viability.

508 U.S. at 60-61 (emphasis added) (citations omitted).

Moreover, "[t]he existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation" *Id.* at 62. The Court added in *PRE* that probable cause is proven when the Plaintiff shows "that the Defendant pressed the action for an improper, malicious purpose." *Id.* (citations omitted). In short, "[p]robable cause to institute civil proceedings requires no more than a 'reasonabl[e] belie[f] that there is a chance that [a] claim may be held valid upon adjudication.' " *Id.* at 62-63 (citations omitted); *see also Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 422, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978) ("[e]ven when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.")

*Appendix C*

Defendant in this case points to *Music Center S.N.C. Di Luciano Pisoni & C. v. Prestini Musical Instruments Corp.*, 874 F.Supp. 543 (E.D.N.Y.1995), as an example of a case where the court did not view the defendant's act of filing a petition with the USITC as "objectively baseless" even though the antidumping petition at issue was ultimately unsuccessful. In *Music Center*, the plaintiffs — an Italian manufacturer of keypads; for woodwind instruments, and a New York importer of these products — sued an American competitor and its principal. Plaintiffs alleged violations of the Sherman Act, as well as state law claims of unfair trade practices, abuse of process and wrongful institution of civil proceedings. Plaintiffs also alleged, *inter alia*, that the defendants made misrepresentations in their antidumping petitions filed with the USITC. However, the USITC had previously made preliminary determinations that (1) the petition was sufficient to initiate an investigation and (2) there was a reasonable indication that the key pad industry in the U.S. was being materially injured by sales at LTFV. *Id.* at 553-54.

However, ultimately, the petition at issue in *Music Center* was unsuccessful, and the USITC, in its final determination found that, despite its initial finding of sales at LTFV, the industry in the U.S. was not being materially injured by reason of imports sold at LTFV. *Id.* at 554. Nevertheless, the court held that the prior antidumping petitions filed by the Defendant corporation could not be viewed as "objectively baseless", so as to allow an antitrust suit by the target of the antidumping investigation. *Id.* at 552-55. Specifically, the court held that:

> [t]he possibility does exist, however remote, that the institution of two unsuccessful antidumping proceedings nine years apart was intended solely to injure plaintiffs competitively in a trade war that defendants appear to be losing, and not to secure the trade relief for which such petitions were created by Congress. Even if such a malevolent intent could be shown, plaintiffs cannot sustain their burden of proving that defendants could not have reasonably expected success on the merits.

*Id.* at 554-55.

Moreover, the court in *Music Center* added that "an inaccurate petition, even one containing deliberate misstatements, might nonetheless not be so lacking in merit as to be objectively baseless." *Id.* at 549. Articulating the policy considerations behind its application of Noerr-Pennington, the court also said:

> To allow antitrust claims based solely on broad and indistinct allegations of misrepresentation and "sham litigation" to reach discovery, regardless of the role the claimed misrepresentations played, or could have played, in the prior proceeding, would predicate the viability of an antitrust complaint on a petitioner's subjective intent, and not the objective merit of its petition, and thus directly contravene the Supreme Court's holding in PRE. Moreover, such discovery would have the effect

> of encouraging antitrust "strike suits", and effectively chill the First Amendment rights which Noerr immunity was intended to protect.

*Id.* (citations omitted); *see also PRE*, 508 U.S. at 60 ("fidelity to precedent compels us to reject a purely subjective definition of 'sham.' The sham exception so construed would undermine, if not vitiate Noerr.");[21] *Bio-Technology General Corp. v. Genentech, Inc.*, 886 F.Supp. 377, 380 (S.D.N.Y.1995) ("The Noerr-Pennington doctrine, which has its roots in the First Amendment, ensures that those who petition the government in good faith for redress are generally immune from antitrust liability.") (citations omitted).

In this case, Ethyl filed a Petition with the USITC, alleging that it was being materially injured, and threatened with material injury, because Cheminor was "dumping" subsidized bulk ibuprofen in the U.S. market. On September 16, 1991, the USITC issued its preliminary determination, in which it found that there was a reasonable indication that the ibuprofen industry in the U.S. was materially injured by reason of imports of bulk ibuprofen, which was allegedly being subsidized by the Government of India and sold in the U.S. Leonard Certif. ¶ 17. The USITC cited two separate

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21. The *PRE* Court left open the specific question of "whether and, if so, to what extent Noerr permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations." 508 U.S. at 61 n. 6 (citations omitted). The Court did state, however, that "[t]o be sham . . . . litigation must fail to be 'genuine' " and that "genuine" means "sincerely and honestly felt or experienced." *Id.* at 61.

and distinct indications of material injury: (1) that Ethyl's "financial trends" demonstrated material injury; and (2) that "other factors, such as apparent domestic consumption and market share, further provide a reasonable indication of present injury." USITC Report at 16. On December 13, 1991, the DOC also made a preliminary determination in favor of Ethyl, finding a subsidy in the amount of 43.71%. Additionally, on February 27, 1992, the DOC preliminarily determined that imports of bulk ibuprofen from India were being sold in the U.S. at LTFV and that there was an estimated dumping margin of 115.94%. Leonard Certif. ¶ 26. These preliminary determinations contained three separate and distinct components: the DOC's findings of subsidization and dumping, and the USITC's finding of material injury or threat of material injury.

However, even if the Court were (1) to ignore these preliminary determinations and be unwilling (2) to find that Ethyl's Petition would ultimately have been "successful", in order to prevail in the instant lawsuit Cheminor must establish that Ethyl did not have a reasonable basis for filing the Petition. *See PRE,* 508 U.S. at 62 ("[u]nder the objective prong of the sham exception, the Court of Appeals correctly held that sham litigation must constitute the pursuit of claims so baseless that no reasonable litigant could realistically expect to secure relief.") Cheminor has not presented any evidence suggesting that the preliminary determinations in favor of Ethyl were wrong or that Ethyl did not have a reasonable basis for claiming that bulk ibuprofen from India was being subsidized by the Government of India and dumped into the U.S. market. Rather, plaintiffs have largely ignored the DOC's findings

of underpricing and the USITC's conclusions regarding the sharply increasing volume of Cheminor's imports. Instead, plaintiffs have based their lawsuit against Ethyl on allegations that it (Ethyl) had misrepresented the condition of the ibuprofen business and manipulated its financial documents.

The USITC Report cited two separate and distinct reasons to support its finding of material injury: (1) that Ethyl's "financial trends" demonstrated material injury; and (2) that "other factors, such as apparent domestic consumption and market share, further provide a reasonable indication of present injury." USITC Report at 16. More specifically, the USITC began its injury analysis by identifying the factors it would consider in making its injury determination; they included domestic consumption, production, capacity, capacity utilization, shipments, inventories, employment, financial performance, capital investment, and research and development efforts. *Id.* at 15-16. In articulating the bases for its conclusion that Ethyl was being materially injured, the USITC stated: first, that "financial trends provide a reasonable indication of present material injury" and second, that "other factors, such as apparent domestic consumption and market share, further provide a reasonable indication of present injury." *Id.* at 16. In addition, in the section of the USITC Report entitled "Additional Views of Acting Chairman Anne E. Brunsdale", Chairman Brunsdale bases her conclusion of material injury on the following three factors: (1) "the subject imports are quite substitutable" for domestic bulk ibuprofen, (2) "the alleged dumping and subsidy margins in these investigations are quite high" and (3) the share of U.S. bulk ibuprofen

market accounted for by the Indian imports is not small enough to ensure that there is no material injury. *Id.* at 26-27.

Plaintiffs' allegations of misrepresentation focus on Ethyl's financial documents and have nothing to do with "domestic consumption" or "market share" — factors relied on by the USITC. Plaintiffs' misrepresentation allegations also have nothing to do with imports, dumping and subsidy margins or market share — the factors relied on by Chairman Brunsdale in her conclusion of material injury. Thus, even assuming, *arguendo,* that Ethyl misrepresented its financial information,[22] plaintiffs have not proven that the Petition was "objectively baseless." — i.e., amounting to nothing more than "sham litigation".

Plaintiffs made the point during oral argument that Ethyl loses its protection under *PRE* because of the alleged misrepresentations it made to the USITC. Tr. at 27. The *PRE* Court, however, left open the specific question of "whether and, if so, to what extent Noerr permits the

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22. Here, the Court need not address the second part of the *PRE* Court's two-part definition of "sham" litigation and determine whether there is subjective evidence that Ethyl misrepresented its financial documents to the USITC in order to "interfere directly" with "the business relationships of [its] . . . competitor [Cheminor]". 508 U.S. at 60-61. Rather, "[i]f an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under Noerr, and an antitrust claim premised on the sham exception must fail." *Id.* at 60. There is no evidence in this case that Ethyl's lawsuit was "objectively baseless". Therefore, under *PRE,* this Court does not need to go any further in its analysis.

imposition of antitrust liability for a litigant's fraud or other misrepresentations." 508 U.S. at 61 n. 6 (citations omitted). The court in *Music Center,* 874 F.Supp. at 549, stated that "an inaccurate petition, even one containing deliberate misstatements, might nonetheless not be so lacking in merit as to be objectively baseless." Moreover, the Federal Court in *Nobelpharma v. Implant Innovations, Inc.,* 129 F.3d 1463 (Fed.Cir.1997) (patent infringement case where the infringer counterclaimed for antitrust violations), specifically analyzed footnote six in the *PRE* decision. In *Nobelpharma,* the Federal Circuit reversed the trial court's decision, stating that "the district court made its own determination that PRE's two-part test for a sham is inapplicable to an antitrust claim based on the assertion of a patent obtained by knowing and willful fraud. We do not agree with that determination." *Id.* at 1471. The court stated that:

> PRE and Walker Process provide alternative legal grounds on which a patentee may be stripped of its immunity from the antitrust laws; both legal theories may be applied to the same conduct. Moreover we need not find a way to merge these decisions. Each provides its own basis for depriving a patent owner of immunity from the antitrust laws. The Supreme Court saw no need to merge these separate lines of cases and neither do we.
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> * * * *
>
> If the elements for finding a fraud within the meaning of Walker Process, as well as other

> criteria for antitrust liability, are met, such liability can be imposed without an additional sham inquiry. Alternatively, when an antitrust claim is based on a PRE allegation that a suit is baseless, in order to prove that a suit is within Noerr's "sham" exception to immunity, an antitrust plaintiff must prove that the suit was both objectively baseless and subjectively motivated by a desire to impose collateral, anti-competitive injury rather [sic]to obtain a justifiable legal remedy . . . Thus, under PRE, a sham suit is one that is both objectively baseless and subjectively brought in bad faith. If a suit is not objectively baseless, an antitrust defendant's subjective motivation is immaterial.

*Id.* at 1471-72. Additionally, although misrepresentation is a big part of plaintiffs' argument in its opposition to this motion, the Amended Complaint does not include a fraud claim against the defendants. The conclusory references to fraud in the fact section of the Amended Complaint do not comport with the particularity requirement of Fed.R.Civ.P. 9(b). *See* Hansen Certif.Ex. J.

Accordingly, in order for an antitrust claim based on the sham litigation exception to Noerr-Pennington to survive, plaintiffs must demonstrate that there was absolutely no objective merit to Ethyl's Petition — i.e., that the Petition amounted to "sham" litigation or to claims "so baseless that no reasonable litigant could realistically expect to secure favorable relief." 508 U.S. at 62. Plaintiffs in this case have failed to demonstrate that there is a genuine issue as to a material fact regarding the "objective basis" of Defendant's Petition. *See Nobelpharma,* 129 F.3d at 1472

("If a suit is not objectively baseless, an antitrust defendant's subjective motivation is immaterial.") Defendant is therefore immune from antitrust liability pursuant to the First Amendment and the Noerr-Pennington doctrine. Accordingly, defendant Ethyl is entitled to summary judgment as to plaintiffs' antitrust claims.[23]

***State Law Claims***

This Court cannot exercise supplemental jurisdiction over state law claims unless, at a minimum, there is:

> a federal claim of sufficient substance to confer subject matter jurisdiction on the court. The substantiality of the federal claim is ordinarily determined on the basis of the pleadings. If it appears that the federal claim is subject to dismissal under F.R.Civ .P. 12(b)(6) or could be disposed of on a motion for summary judgment under F.R.Civ.P. 56, then the court should ordinarily refrain from exercising jurisdiction in the absence of extraordinary circumstances.

---

23. Plaintiffs federal antitrust claim against the defendants is vitiated by the Noerr-Pennington doctrine. To the extent that plaintiffs allege a separate antitrust claim pursuant to state law, courts have consistently found that the failure to state viable federal antitrust claims is fatal to state antitrust claims. *Inter-City Tire and Auto Center, Inc. v. Uniroyal, Inc.*, 701 F.Supp. 1120, 1124-25 (D.N.J.1988), *aff'd*, 888 F.2d 1380 (3d Cir.1989); *see also Regency Oldsmobile, Inc. v. General Motors Corp.*, 723 F.Supp. 250, 270 (D.N.J.1989) (Because Defendant is entitled to summary judgment on Plaintiff's "federal antitrust claims, it is also entitled to a like judgment on [Plaintiff's] . . . state antitrust claims.")

*Tully v. Mott Supermarkets, Inc.*, 540 F.2d 187, 195-96 (3d Cir .1976) (citations omitted); *see also Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430 (3d Cir.1997) (court declined to exercise supplemental jurisdiction over breach of contract, breach of implied covenants of good faith and fair dealing and tortious interference with contract claims after dismissing federal antitrust claim pursuant to Fed.R.Civ.P. 12(b)(6)). Whether or not a district court chooses to exercise supplemental jurisdiction over remaining state law claims is a matter of "sound discretion". *Id*. at 444. In making this decision, the court should consider whether dismissal would "be unfair to the litigants or result in waste of judicial resources". *Id.*[24]

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24. 28 U.S.C. § 1367(c) is the applicable supplemental jurisdiction statute, stating that:

> (C) the district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if —
>
> > (1) the claim raises a novel or complex issue of State law,
> >
> > (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
> >
> > (3) the district court has dismissed all claims over which it has original jurisdiction, or
> >
> > (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

*Appendix C*

Plaintiffs in this case allege a number of state law claims against the defendant Ethyl. Specifically, plaintiffs allege claims of malicious prosecution, abuse of process, tortious interference with a contract and with a prospective economic advantage and unfair competition. However, pursuant to the Noerr-Pennington immunity doctrine, plaintiffs' federal antitrust claim is subject to dismissal by this Court. Accordingly, given that there are no "extraordinary circumstances" justifying retention of supplemental jurisdiction over the state law claims in this case and that there is no evidence that dismissal would be "unfair to the litigants or result in waste of judicial resources", the Court dismisses plaintiffs' remaining state law claims against Ethyl.

*CONCLUSION*

For the reasons stated above, defendant Ethyl's motion for summary judgment is granted in its entirety.

*Appendix C*

**ORDER**

This matter having been opened to the Court by Lowenstein, Sandler, Kohl, Fisher & Boylan, attorneys for defendant Ethyl Corporation ("Ethyl"), and the Court having considered the submissions of the parties and having heard oral argument, and good cause appearing,

IT IS on this 5th day of February, 1998,

ORDERED that defendant's motion for summary judgment, pursuant to Fed.R.Civ.P. 56(c), for an Order of dismissal of the Complaint is hereby granted; and

IT IS FURTHER ORDERED that a copy of this Order be served on all parties within seven (7) days of the date of this Order.

## APPENDIX D — DECISION OF THE UNITED STATES INTERNATIONAL TRADE COMMISSION DATED SEPTEMBER 16, 1991

**BULK IBUPROFEN**
**FROM INDIA**

Determination of the Commission in Investigation No. 701-TA-308 (Preliminary) Under the Tariff Act of 1930, Together With the Information Obtained in the Investigation

Determination of the Commission in Investigation No. 731-TA-526 (Preliminary) Under the Tariff Act of 1930, Together With the Information Obtained in the Investigation

**USITC PUBLICATION 2428**

**SEPTEMBER 1991**

United States International Trade Commission
Washington, DC 20436

*Appendix D*

**UNITED STATES INTERNATIONAL TRADE COMMISSION**

**COMMISSIONERS**

**Anne E. Brunsdale, Acting Chairman**

**Seeley G. Lodwick**
**David B. Rohr**
**Don E. Newquist**

**Charles Ervin,**
**Director of Operations**

***Staff assigned:***

**Elizabeth Haines, Investigator**
**Brad Hudgens, Investigator**
**Robert Randall, Commodity — Industry Analyst**
**Joseph Baremore, Economist**
**Jim Stewart, Accountant/Auditor**
**Andrea Casson, Attorney**

**Vera Libeau, Supervisory Investigator**

**Address all communications to**
**Kenneth R. Mason, Secretary to the Commissioner**
**United States International Trade Commission**
**Washington, DC 20436**

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Note. — Information that would reveal the confidential business information of individual firms may not be published and therefore has been deleted from this report. Deletions are indicated by asterisks.

*Appendix D*

# UNITED STATES INTERNATIONAL TRADE COMMISSION

Investigations Nos. 701-TA-308 (Preliminary) and 731-TA-526 (Preliminary)

## BULK IBUPROFEN FROM INDIA

*Determinations*

On the basis of the record[1] developed in the subject investigations, the Commission determines, pursuant to sections 703(a) and 733(a) of the Tariff Act of 1930 (19 U.S.C. §§ 1671b(a) and 1673b(a)), that there is a reasonable indication that an industry in the United States is materially injured by reason of imports from India of ibuprofen in bulk form, provided for in subheading 2916.39.15 of the Harmonized Tariff Schedule of the United States, that are alleged to be subsidized by the Government of India and sold in the United States at less than fair value (LTFV).

*Background*

On July 31, 1991, a petition was filed with the Commission and the Department of Commerce by Ethyl Corporation, Richmond, VA, alleging that an industry in the United States is materially injured by reason of subsidized and LTFV imports of bulk ibuprofen from India. Accordingly, effective July 31, 1991, the Commission

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1. The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR § 207.2(f)).

instituted countervailing duty investigation No. 701-TA-308 (Preliminary) and antidumping investigation No. 731-TA-526 (Preliminary).

Notice of the institution of the Commission's investigations and of a public conference to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the *Federal Register* of August 7, 1991 (56 F.R. 37571). The conference was held in Washington, DC, on August 21, 1991, and all persons who requested the opportunity were permitted to appear in person or by counsel.

*Appendix D*

## VIEWS OF THE COMMISSION

Based on the information obtained in these preliminary investigations, we determine that there is a reasonable indication that an industry in the United States is materially injured by reason of imports of bulk ibuprofen from India that allegedly are subsidized and sold at less than fair value (LTFV).

### I. *The Legal Standard in Preliminary Investigations*

The legal standard in preliminary countervailing duty and antidumping investigations is set forth in sections 703(a) and 733(a) of the Tariff Act of 1930, as amended.[1] Those sections require the Commission to determine whether, based on the best information available at the time of the preliminary determination, there is a reasonable indication of material injury to a domestic industry, or threat thereof, or material retardation of establishment of an industry, by reason of the imports under investigation.[2]

In *American Lamb Co. v. United States*,[3] the United States Court of Appeals for the Federal Circuit addressed the standard for preliminary determinations. The Court held

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1. 19 U.S.C. §§ 1671b(a), 1673b(a).

2. *Maverick Tube Corp. v. United States*, 687 F. Supp. 1569, 1573 (Ct. Int'l Trade 1988). Material retardation of the establishment of an industry is not an issue in this investigation and will not be discussed further.

3. 785 F.2d 994 (Fed. Cir. 1986).

that the reasonable indication standard requires more than a finding that there is a possibility of material injury or threat thereof, and that the Commission is to determine if the evidence obtained demonstrates that a reasonable indication exists. The Commission may render a negative preliminary determination only if: "(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation."[4]

II. *Like Product*

A. *Background*

In determining whether there is a reasonable indication of material injury or threat thereof to a domestic industry, the Commission must make threshold factual determinations with respect to "like product" and "domestic industry." Section 771(4)(A) of the Tariff Act of 1930 defines the term "industry" as "the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product. . . ."[5] "Like product" is defined as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation . . . ."[6]

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4. *Id.* at 1001.

5. 19 U.S.C. § 1677(4)(A).

6. 19 U.S.C. § 1677(10).

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The Department of Commerce (Commerce) defines the imported merchandise that is subject to the investigation, and the Commission determines the domestic products "like" the imports.

In the initiation notice, Commerce defined the product under investigation as follows:

> The product covered by this investigation is bulk ibuprofen from India. Bulk ibuprofen, a white powder, is a non-steroidal anti-inflammatory agent which also has analgesic and antipyretic activity. It is used in the symptomatic treatment of acute and chronic rheumatoid arthritis, osteoarthritis, primary dysmenorrhea and for the relief of mild to moderate pain. The chemical description of bulk ibuprofen is 2-(4-isobutylphenyl) propionic acid, $C_{13}H_{18}O_2$. The product covered by this investigation does not include ibuprofen sold in tablet, capsule or similar forms for direct human consumption. . . .[7]

Each producer of bulk ibuprofen uses a slightly different chemical reaction process to produce the product. Petitioner, Ethyl Corporation (Ethyl) employs a seven-step process using two raw materials, isobutyl benzene and acetyl chloride. This process is explained in the Commission Report.[8]

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7. 56 Fed. Reg. 42026 (August 26, 1991).

8. Report at A-4.

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The bulk ibuprofen is purchased by pharmaceutical companies, which add inert and active ingredients to formulate ibuprofen tablets as well as products containing both ibuprofen and other pharmaceutical ingredients (*e.g.*, cold medication). Over the counter ibuprofen tablets in 200 milligram dosages and prescription ibuprofen tablets in 300, 400, 600, and 800 milligram dosages are sold under both trade and generic labels.

The sale of tableted ibuprofen in the U.S. market entails two levels of approval by the Food and Drug Administration (FDA).[9] First, the bulk producer must receive FDA approval as a qualified producer. This process begins with the filing of a Drug Master File (DMF), which is reviewed only after a U.S. tableter applies to the FDA for approval to use that bulk producer's product. Upon receipt of such application, the FDA inspects the facilities of the bulk producer, after which the FDA may approve the company as a qualified producer.

In addition to approval of the bulk producer, sale of ibuprofen tablets requires FDA approval of the finished product which the tableter intends to sell. To receive this approval, the tableter conducts required tests of each dosage strength of the product, and submits its data to the FDA. If the FDA is satisfied with the results, it then grants approval to market tablets containing the manufacturer's bulk ibuprofen. Each dosage strength produced by the

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9. *See* Report at A-5.

manufacturer must be approved separately by the FDA, even if the source of the bulk is the same.[10]

There are two like product issues raised in this investigation, both of which address the possible broadening of the like product beyond Commerce's scope determination. The first question is whether the like product should include "downstream" oral dosage forms of ibuprofen, such as tablets, caplets or liquids. The second question is whether the like product should include other analgesics, particularly aspirin and acetaminophen.

The Commission's decision regarding the appropriate like product or products in an investigation is essentially a factual determination, and the Commission has applied the statutory standard of "like" or "most similar in characteristics and uses" on a case-by-case basis.[11] In analyzing like product issues, the Commission generally

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10. Under the Drug Price Competition and Patent Term Restoration Act of 1984, applicants seeking approval of generic versions of post-1962 drugs can file Abbreviated New Drug Applications (ANDAs), which excuse the applicant from repeating the safety and efficacy tests required in New Drug Applications. Transcript of Conference (August 21, 1991) (Tr.) at 69-70. *See Generic Cephalexin Capsules from Canada*, Inv. No. 731-TA-423 (Final), USITC Pub. 2211 at 15 (1989). However, because of recent problems involving the manufacture of some generic drugs, the FDA has tightened up the process of reviewing ANDAs, and may take up to two years to approve an ANDA. Report at A-5.

11. *Asociacion Columbiana de Exportadores de Flores, et al. v. United States* ("*ASOCOFLORES*"), 693 F.Supp. 1165, 1169 (Ct. Int'l Trade 1988).

considers a number of factors including: (1) physical characteristics; (2) end uses; (3) interchangeability of the products; (4) channels of distribution; (5) production processes; (6) customer or producer perceptions of the products; (7) the use of common manufacturing facilities and production employees; and (8) price.[12] No single factor is dispositive, and the Commission may consider other factors that it deems relevant based upon the facts of a given investigation.

B. *Inclusion of oral dosage forms in the like product*

Petitioner argues that the like product should include only bulk ibuprofen and should not be expanded to cover oral dosage forms. Respondents disagree and urge that oral dosage forms be included in the like product definition.

Based on an application of our usual like product criteria, we determine that oral dosage forms of ibuprofen should not be included in the like product. The physical characteristics of bulk and processed ibuprofen are different in that the former is an easily-compressible powder not soluble in water whereas the latter is a tablet, caplet, or liquid that is hard to compress and soluble in water. Bulk ibuprofen is not interchangeable with the dosage forms and is not approved by FDA as a drug product, whereas the

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12. *See, e.g., Sweaters Wholly or in Chief Weight of Manmade Fibers from Hong Kong, the Republic of Korea, and Taiwan*, Invs. Nos. 731-TA-448-450 (Final), USITC Pub. 2312 (Sept. 1990) ("Sweaters") at 4-5; *Certain Steel Pails from Mexico*, Inv. No. 731-TA-435 (Final), USITC Pub. 2277 (May 1990) at 4.

dosage forms must be so approved before they can be sold.[13] Bulk ibuprofen is not sold to pharmacies or to the ultimate consumers (*e.g.*, patients) of the product.

Because the "customers" of bulk and oral dosage forms are different, it follows that their perceptions are different. The consumers of bulk ibuprofen are the pharmaceutical firms that purchase bulk ibuprofen and then process it into dosage forms. Plainly, they do not perceive the bulk product and the processed product as interchangeable. Bulk ibuprofen is not even offered for sale to the purchasers and end users of oral dosage forms. Further, only by purchasing a processed form of ibuprofen can the retailer or consumer ascertain exact dosage strengths.

There is no overlap in distribution channels of bulk and oral dosage forms. Bulk ibuprofen is sold only to dosage manufacturers who have been approved by the FDA. Ibuprofen dosage forms are sold directly to distributors, hospitals, or stores.

There is not a commonality of manufacturing processes, facilities, or employees. There are no domestic manufacturers of both bulk and oral dosage ibuprofen. As such, there are no common manufacturing facilities or employees. In addition, the manufacturing processes differ substantially. Bulk ibuprofen is manufactured through a multi-step chemical process that requires the use of organic

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13. As discussed above and in the Commission Report, the bulk producer must be approved by the FDA as a qualified producer, but the bulk product itself does not receive independent FDA approval.

solvents, acids, bases, catalysts in large reaction vessels, and distillation columns. Dosage forms are processed using small blenders, fluid bed granulators and dryers, tablet pressers, coaters, and packaging machinery. The processing of bulk ibuprofen into oral dosage forms adds an additional 50-100 percent to the value of the product.[14]

Finally, there is a significant price difference between bulk and oral dosage ibuprofen. Bulk ibuprofen sells in the range of $15.00-$25.00 per kilogram.[15] Dosage forms retail at many times that amount, with the exact price depending on the form, strength, and label under which the product sells.

In two previous Title VII investigations, the Commission has addressed similar like product questions. In *Certain Acetylsalicylic Acid (Aspirin) from Turkey* ("*Aspirin*")[16] the product under investigation was bulk aspirin, and the Commission found the like product to consist of bulk aspirin.[17] In *Generic Cephalexin Capsules*

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14. Tr. 64 (anywhere from 50 to 75 percent of the total cost to make one tablet is the cost of bulk ibuprofen). *Compare with Cephalexin* at 8-9 (Ninety percent of the finished product was bulk cephalexin, and the processing required to achieve the finished product was "not extensive.")

15. Report at A-6.

16. Invs. Nos. 701-TA-283 and 731-TA-364 (Final), USITC Pub. 2001 (1987).

17. It should be noted, however, that in *Aspirin*, the issue of including the aspirin tablets in the like product was not expressly raised or discussed in either the Commission's Report or Decision.

*from Canada* ("*Cephalexin*"), the Commission broadened the like product definition to include "upstream" bulk cephalexin as well as oral dosage form, including tablets and oral suspension powders.[18]

Respondents contend that *Cephalexin* is "controlling" here,[19] whereas petitioner relies on the determination in *Aspirin*. We find that this investigation is most like the *Aspirin* investigation, in that the product under investigation is the upstream bulk version of the substance rather than the processed downstream tableted form. Moreover, we recently have stated our reluctance to broaden the like product to include products downstream from the product under investigation.[20]

As the Commission noted in *Tungsten Ore*, broadening the definition of a like product, and hence the definition of the domestic industry, to include products which result from

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18. USITC Pub. 2211 at 7-9.

19. Respondents' postconference brief at 3. We note that a previous like product determination, especially one involving a different product under investigation, is not "controlling." The Commission determines like product on a *sui generis* basis in each investigation, although it may look at previous determinations for guidance and must explain departures from like product definitions involving identical products. *See Citrosuco Paulista S.A. v. United States*, 704 F. Supp. 1075, 1088 (Ct. Int'l Trade 1988).

20. *See e.g., Tungsten Ore Concentrates from the People's Republic of China*, Inv. No. 731-TA-497 (Preliminary), USITC Pub. 2367 at 7 (March 1991).

further processing of the article subject to investigation, has the effect of including within the domestic "industry" producers of a product, whose interest, as consumers, may be contrary to that of the producers of the bulk product corresponding directly to the product subject to investigation.[21] This is so in this investigation. The only current (Ethyl) or anticipated (Boots-Hoechst-Celanese or BHC) domestic producers of bulk ibuprofen do not produce oral dosage forms of ibuprofen in the United States.[22] Rather, they sell the bulk product to any of approximately 27 purchasers, who then further process it into oral dosage forms for sale to distributors, hospitals, or retailers. Indeed, inclusion of the tableters in the domestic industry would lead to the unwarranted result in this case of including within the industry all of the tableters who purchase the allegedly LTFV imports as the base ingredient used in their domestically produced finished tablets.

Moreover, the Commission's determination to broaden the like product in *Cephalexin* was based on an application of its "semi-finished" criteria traditionally applied to evaluate whether semifinished or component products are like the finished products subject to investigation. As noted in *Tungsten Ore*, the Commission generally has applied these criteria only in instances in which the finished, or further processed product, is included within the article

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21. USITC Pub. 2367 at 9.

22. Ethyl does not produce tablets or any other processed ibuprofen product. A company related to BHC (Boots PLI) produces both bulk and tablets in the United Kingdom, but BHC does not intend to produce both in the United States.

subject to investigation. It has not been the Commission's practice to apply its "semi-finished" criteria to include a finished product in the like product when the scope of the investigation covers only a lesser-processed input.[23]

C. *Inclusion of Aspirin and Acetaminophen in the Like Product*

Petitioner argues that the like product should be limited to bulk ibuprofen and should not include any other analgesics in any form. Respondents, in addition to arguing that the like product should include oral dosage forms, urge that the Commission expand the like product to include aspirin and acetaminophen. In *Aspirin*, the Commission considered whether bulk ibuprofen and bulk acetaminophen were "like" the bulk aspirin under investigation and determined that they were not.[24] Respondents suggest that the determination in *Aspirin* was merely "dicta" and was not based upon a thorough investigation of the relevant information because the parties did not dispute the issue.

Respondents' characterization aside, an application of the like product criteria supports a definition similar to that

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23. *Tungsten Ore*, USITC Pub. 2367 at 8.

24. We note, however, that two of the four voting Commissioners either expressed reservations about not including other analgesics in the like product or indicated that the issue was moot in part because the Commission had not obtained data on the firms producing acetaminophen and ibuprofen. USITC Pub. 2001 at 12-13 (dissenting views of Chairman Liebler) and 27-28 (dissenting views of Vice Chairman Brunsdale).

found in *Aspirin*, i.e., that the like product should not include aspirin or acetaminophen.[25] With regard to physical characteristics, respondents agree with petitioner that the three products differ in their chemical compositions. In addition, according to petitioner, the three substances also have different chemical properties, such as melting points and chemical stability.[26]

Broadly speaking, the three substances serve the same essential end use, i.e. relief of pain. However, there are some particular symptoms for which each may be the preferred drug.[27] Aspirin and ibuprofen have anti-inflammatory properties, whereas acetaminophen does not. Aspirin is often used for treatment of cardiovascular problems; ibuprofen is more effective against arthritic pain; and acetaminophen is a more effective fever reducer. The Commission previously has declined to group into one like product various types of medicines solely because they share a common therapeutic purpose.[28]

The bulk forms of the products are not interchangeable. The bulk forms of each can be used only to make the oral dosage form of the corresponding prescription or

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25. For discussion of her views on this issue, see *Additional Views of Acting Chairman Anne E. Brunsdale, infra.*

26. Petitioner's postconference brief at 4.

27. *See* Report at A-5, n. 10; Tr. 52.

28. *Cephalexin* at 9-10 (like product not broadened to include non-cephalexin cephalosporin or other antibiotics.)

over-the-counter medication. In addition, bulk acetaminophen can also be used to make nondrug products such as photographic chemicals and azo dyes.

Although the channels of distribution are similar for all three types of products, i.e., direct sales of the bulk product from its producer to pharmaceutical companies which have been approved to manufacture the drug products made with that bulk drug substance,[29] customer perceptions differ. The bulk producers' customers, i.e., the pharmaceutical companies which purchase and process the bulk products, do not perceive the bulk products as interchangeable.[30]

Petitioner Ethyl is the only current manufacturer of bulk ibuprofen, and it does not manufacture either aspirin or acetaminophen in any form. BHC is building a domestic facility for the production of bulk ibuprofen at a site in Bishop, Texas, where one of its owners (Hoechst Celanese) is also building an acetaminophen plant. However, BHC has represented that the ibuprofen facility will be operated independently from the acetaminophen plant and that there

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29. Petition at 6; Petitioner's postconference brief at 5; Respondents' postconference brief at 9.

30. The end users of the pain relief products may view the finished tablets as largely interchangeable for pain relief. There is some evidence obtained in the investigation that increased sales of one type of analgesic can correspond to decreases in sales of the other types. Respondents' postconference brief, Exhibits 3 & 4; Tr. 56.

will be no sharing of production employees.[31] The information obtained regarding comparisons of machinery and processes used for producing the three different substances is very general. Respondents focus on similarities in some equipment used to process bulk substances into oral dosage forms,[32] which is not the appropriate focus in light of our definition of a like product limited to the bulk product. Confidential, albeit general, information that was received concerning comparisons between production of bulk ibuprofen and bulk forms of other analgesics suggests that the manufacturing equipment is dissimilar.

There is a substantial difference in the prices of the bulk products. Bulk ibuprofen ranges from $15.00-25.00 per kilogram, as compared to $1.00-$2.00 per kilogram for aspirin and $5.00-$7.00 per kilogram for acetaminophen.

E. *Conclusions Regarding Like Product*

For the purposes of these preliminary investigations, we find one like product coextensive with the scope of the investigation. This product is defined as bulk ibuprofen and does not include other analgesics.

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31. BHC's submission at 6. BHC did not appear as a party in the investigation, but filed a nonparty submission pursuant to Commission Rule 207.15.

32. Respondents' postconference brief at 10.

*Appendix D*

III. *Domestic Industry*

Section 771(4)(A) of the Tariff Act of 1930 defines domestic industry as:

> . . . the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product.[33]

Concomitant with the recommended like product definition, the domestic industry consists of the domestic producers of bulk ibuprofen. During the period of investigation, Ethyl has been the only producer in this domestic industry. Respondents, however, have suggested that BHC, which is in the process of building a facility in Texas for the production of bulk ibuprofen, should be included in the domestic industry. Petitioner, Ethyl, argues against inclusion of BHC. BHC has filed a nonparty submission, but has not expressed a view as to whether it is part of the domestic industry.

In previous investigations, the Commission generally has not included in the domestic industry companies which have not begun commercial production of the like product.[34]

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33. 19 U.S.C. § 1677(4)(A).

34. *E.g., 3.5" Microdisks and Media Thereof from Japan*, Inv. No. 731-TA-389 (Preliminary), USITC Pub. 2076 at 18, n. 41. (1988). In *Fresh and Chilled Atlantic Salmon from Norway*, Invs.

(Cont'd)

Likewise, it does not seem appropriate to include BHC in the domestic industry producing bulk ibuprofen, at least for the purposes of the preliminary investigations. BHC has not begun commercial production. The production of samples necessary for its customers to receive FDA approval of the finished product does not rise to the level of commercial production that would warrant inclusion in the existing domestic industry. These samples are not sold and have been produced only on a small scale in insignificant overall quantities at a separate research and development laboratory maintained by one of the parent companies.[35]

Accordingly, we find for purposes of these preliminary investigations that BHC is not part of the domestic industry producing bulk ibuprofen.

IV. *Condition of the Domestic Industry*[36]

In assessing the condition of the domestic industry, the Commission considers, among other factors, domestic

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(Cont'd)
Nos. 701-TA-302 and 731-TA-454 (Preliminary), USITC Pub. 2272 (1990), the Commission included in the domestic industry firms which, although they had not yet begun commercial sales, were engaged in the 18-month process of growing harvestable salmon from smolt.

35. Report at A-9 & n. 24.

36. Acting Chairman Brunsdale does not join in the remainder of this opinion. The reasons for her determination that there is a reasonable indication that the subject imports have caused material injury to a domestic industry are discussed in her additional views, *infra*.

consumption, production, capacity, capacity utilization, shipments, inventories, employment, financial performance, capital investment, and research and development efforts.[37] We must evaluate these factors within the context of the business cycle and conditions of competition that are distinctive to the affected industry.[38] For the purposes of these preliminary investigations, the Commission collected data bearing on the condition of the domestic industry for the period 1988 through 1990, as well as interim data for the first six months of 1990 and 1991.

Because there presently is only one domestic producer of bulk ibuprofen, information concerning the condition of the domestic industry is business proprietary and can be discussed only in very general terms. The indicia of industry performance are mixed, with little change in some factors from the beginning to the end of the investigatory period.

The financial trends provide a reasonable indication of present material injury. For example, as illustrated by a public exhibit introduced by Ethyl at the conference, the industry's profitability (as measured by the profit-to-sales ratio) declined substantially from the beginning to the end of the investigatory period, despite an increase in 1989 from the 1988 level.[39]

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37. 19 U.S.C. § 1677(7)(C)(iii).

38. *See id.*

39. Exhibit 1, Tr. 16.

Confidential information concerning other factors, such as apparent domestic consumption and market share, further provide a reasonable indication of present injury. Accordingly, on the basis of the information gathered in these preliminary investigations, we find a reasonable indication of material injury to the domestic industry producing bulk ibuprofen.

V. *Reasonable Indication of Material Injury By Reason of the Subject Imports*

In these preliminary investigations, the Commission must determine whether there is a reasonable indication of material injury or the threat thereof to the domestic industry "by reason of" the imports under investigation.[40] The Commission considers the volume of imports, their effect on prices for the like product, and their impact on domestic producers.[41] In doing so, the Commission examines whether import volumes or increases in volume are significant, whether there has been significant underselling by imports, whether imports significantly depress or suppress prices for the like product, and such factors as domestic production, sales, capacity utilization, inventories, employment, and profits.[42] The Commission may in its discretion examine additional economic factors.[43]

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40. 19 U.S.C. §§ 1971b(a), 1673b(a).

41. 19 U.S.C. § 1677(7)(B)(i).

42. 19 U.S.C. § 1677(7)(C).

43. 19 U.S.C. § 1677(7)(B)(ii).

*Appendix D*

The Commission may consider alternative causes of injury, but it is not to weigh causes.[44] The Commission need not determine that imports are the principal or a substantial cause of material injury.[45] Rather, as the Court of International Trade has held, the Commission is to determine whether imports are a cause of material injury.[46]

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44. *Citrosuco Paulista S.A. v. United States*, 704 F. Supp. 1075, 1101 (Ct. Int'l Trade 1988). Alternative causes may include:

> the volume and prices of imports sold at fair value, contraction in demand or changes in patterns of consumption, trade, restrictive practices of and competition between the foreign and domestic producers, developments in technology, and the export performance and productivity of the domestic industry.

S. Rep. No. 249, 96th Cong., 1st Sess. 74 (1979). Similar language is contained in the House Report. H.R. Rep. 317, 96th Cong., 1st Sess. 47 (1979).

45. "Any such requirement has the undesirable result of making relief more difficult to obtain for industries facing difficulties from a variety of sources; industries that are often the most vulnerable to less-than-fair-value imports." S. Rep. No. 249, at 74-75.

46. *LMI-La Metalli Industriale, S.p.A. v. United States*, 712 F. Supp. 959, 971 (Ct. Int'l Trade 1989), *citing*, *British Steel Corp. v. United States*, 593 F. Supp. 405, 413 (Ct. Int'l Trade 1984); *Hercules, Inc. v. United States*, 673 F. Supp. 454, 481 (Ct. Int'l Trade 1987). *See also*, *Maine Potato Council v. United States*, 613 F. Supp. 1237, 1244 (Ct. Int'l Trade 1985) (The Commission must reach an affirmative determination if it finds that imports are more than a "*de minimus*" cause of injury.)

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Petitioner asserts that the domestic industry has experienced serious financial harm as a result of "dramatic" and increasing rises in the market share and volume of Indian imports.[47] While the precise import data collected from questionnaire responses is business proprietary, we note that the imports of bulk ibuprofen imports from India rose over the investigatory period, both in terms of quantity and value.[48] The Indian imports also gained market share steadily throughout the period, by both quantity and value.[49]

The confidential pricing information shows falling prices, with some evidence of underselling by the Indian imports.[50] There is also some evidence that, even in instances in which the domestic products and imports do not compete directly for sales to the same tableter, alleged unfairly traded Indian imports may still ultimately affect domestic prices by forcing Ethyl's tableter-customers, who compete with tableters using the subject imports, to insist that Ethyl lower or at least not raise its prices so that the prices of the finished tablets can remain competitive.[51]

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47. Petitioner's postconference brief at 18.

48. Report at A-24, Table 14. *See also* Petitioner's Exhibit 1, introduced at the conference, Tr. 16.

49. Report at A-25, Table 15. *See also* Petitioner's Exhibit 1, introduced at the conference, Tr. 16.

50. Report at A-27.

51. *See* Exhibits 2 & 3 to petitioner's postconference brief. Respondents suggest that it is inappropriate to compare prices to

(Cont'd)

VI. *Conclusion*

For the foregoing reasons, we find that there is a reasonable indication that the domestic industry producing bulk ibuprofen is materially injured by reason of allegedly subsidized and LTFV imports of bulk ibuprofen from India.

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(Cont'd)
brand name customers (which they allege account for the majority of Ethyl's customers) with prices to generic customers (which account for all of Flavine's sales). In this regard, respondents allege that Ethyl's brand name customers pay higher prices for bulk ibuprofen than do Flavine's generic tablet customers, because the former are able to command a "premium" for their end product. Respondents' postconference brief at 44; Tr. 137. We note, however, that Ethyl sells bulk ibuprofen to producers of generic as well as brand name tableters. Ethyl states that it charges the same prices to all its customers, and that price distinctions based on whether the tableter produces brand name or generic tablets are prohibited by the Robinson-Patman Price Discrimination Act (15 U.S.C. § 13(a)). *See* Tr. 72. We may explore this issue further in any final investigations.

*Appendix D*

## ADDITIONAL VIEWS OF ACTING CHAIRMAN ANNE E. BRUNSDALE

**Bulk Ibuprofen from India**
**Invs. Nos. 703-TA-308 and 731-TA-526 (Preliminary)**

I agree with my colleagues that there is a reasonable indication that an industry in the United States has been materially injured by reason of imports of bulk ibuprofen from India that are allegedly dumped and subsidized. Because the information assembled by staff in these preliminary investigations covers only domestic producers of bulk ibuprofen, I accept for our purposes here that the like product consists only of bulk ibuprofen and that the domestic industry consists only of the Ethyl Corporation, the only domestic firm that produced bulk ibuprofen during the period of investigation.

In these additional views I discuss two issues. First, I address respondents' argument that a properly defined like product would include the analgesics aspirin and acetaminophen, as well as ibuprofen. While a lack of data precludes my using such a definition in these preliminary investigations, I find the argument quite persuasive and may well broaden my definition of the like product in any final investigations. Second, I discuss the evidence that leads me to find a reasonable indication of material injury in these preliminary investigations.

*Like Product*

Respondents argued that the like product should consist of ibuprofen, aspirin, and acetaminophen both in bulk and oral

dosage forms.[1] This raises two issues. First, should oral dosages should be included along with the bulk products? On this issue, I have little to add to the discussion in the Commission's opinion. I note that producers of oral dosages are purchasers of the bulk ibuprofen that is the subject of the current investigations. As such, they are unlikely to have been injured by any dumping or subsidization of bulk ibuprofen. Indeed, they may have benefited from a reduction in the price of an important input into their production process. Including such purchasers in the domestic industry, which would be the obvious result of including their product in the like product, could mask the extent of any injury to producers who actually compete with the subject. Such an approach is not consistent with the meaning of the statute.

The second issue raised by respondents is whether aspirin and acetaminophen should be included in the like product or whether the like product consists solely of bulk ibuprofen. In thinking about this issue, I find it useful to employ the reasoning I recently set forth regarding like product definition.[2] There, I sought to focus our attention on whether dumping would induce significant substitution among the potential like products by either producers or consumers. By examining substitutability among domestic products, I can identify the types of products that will be significantly affected by any dumping or subsidization of the articles subject to investigation.

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1. Respondents' Post-Conference Brief at 1.

2. See Polyethylene Terephthalate Film, Sheet, and Strip from Japan and the Republic of Korea, Invs. Nos. 731-TA-458 and 459 (Final), USITC Pub. 2383 (May 1991) at 31-43 (Dissenting Views of Acting Chairman Anne E. Brunsdale).

*Appendix D*

The question of whether to include aspirin and acetaminophen in the like product appears to involve the issue of substitution by consumers.[3] Specifically, respondents pointed to considerable evidence that all three products are useful in reducing fever and in relieving the same types of pain and discomfort. The labels for the three products cite their effectiveness for the same ailments, as do several experts cited by respondents.[4] Further, market research and advertising appear to treat all three as competitors of each other.[5] This evidence would seem to suggest that any suppression or depression of the price of ibuprofen caused by dumping or subsidies would lead some consumers to purchase ibuprofen rather than aspirin or acetaminophen. As a result, producers of these products, as well as producers of ibuprofen, would be affected by any unfair pricing of imported ibuprofen.

Of course, the question is not whether *any* consumers would respond to the price change, but *how many* consumers would respond. If only a small percentage of consumers would shift in response to a price change, then there would

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3. Given our current knowledge, there does not appear to be any issue of production substitutability. However, I would be interested in any additional information on this issue in any final investigations.

4. See Respondents' Post-Conference Brief at 5-6 and the sources cited there.

5. For example, respondents provide two studies of the analgesics market which show changes in the market shares of the three drugs within the overall analgesics grouping. (See Respondents' Post-Conference Brief at Exhibit 4.)

be no significant effects on producers of aspirin and acetaminophen, and those products should not be included in the like product. However, if a large percentage of consumers would change their purchasing patterns in response to a modest change in relative prices, then all three products should be included in the like product. I would be most interested, in the event of any final investigations, in any studies or other evidence on the extent to which consumer demand for aspirin or acetaminophen products are affected by changes in the price of ibuprofen.[6]

*Reasonable Indication of Material Injury by Reason of Unfair Imports*[7]

While the record in a preliminary antidumping investigation is less developed than in a final investigation, I am required

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6. I note that to the extent there is competition among ibuprofen, aspirin, and acetaminophen, it is at the final consumer level, not where the bulk product is purchased. For example, a tablet producer, the immediate purchaser of the three products in bulk form, must purchase bulk aspirin to fill an order for aspirin tablets; he may not substitute bulk ibuprofen. This does not seem to create any significant problems for treating the three analgesic products as being the same like product in this case, at least in part because essentially all bulk aspirin, acetaminophen, and ibuprofen are used to produce oral doses of the three products and the bulk products clearly impart the essential characteristic to the resulting oral doses. However, the competition is certainly somewhat different from what the Commission considers in the average case. I would therefore also be interested in the views of the parties concerning any problems created by this approach.

7. The above discussion strongly suggests that the appropriate like product in these investigations includes bulk aspirin and

(Cont'd)

to answer the same basic question in both instances. I therefore find it useful to employ in preliminaries the same simple tools of economic analysis I utilize in final investigations. By using economic analysis, one can examine directly — as our governing statute requires — the impact of the imports in question on the domestic industry, the nature of any such impact, and finally whether that impact constitutes material injury.[8, 9]

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(Cont'd)

acetaminophen in addition to bulk ibuprofen. However, as noted previously, the lack of data on aspirin and acetaminophen precludes me from employing this definition for purposes of these preliminary investigations. Therefore, my discussion of material injury is based on the assumption that the like product consists of only bulk ibuprofen.

8. In addition, I have examined the information on the condition of the domestic industry as reported in the Staff Report and find it useful in determining whether the injury resulting from any dumping and subsidization is material. Because there is only one domestic producer of bulk ibuprofen, this information is confidential and cannot be discussed in any detail in a public report.

9. A more thorough discussion of the economic analysis I use in my approach to causation analysis is contained in Internal Combustion Forklift Trucks from Japan, Inv. No. 731-TA-377 (Final), USITC Pub. 2082, at 66-83 (May 1988) (Additional Views of Vice Chairman Anne E. Brunsdale); see also Certain Steel Pails from Mexico, Inv. No. 731-TA-435 (Final), USITC Pub. 2277, at 24-28 (March 1990) (Additional Views of Chairman Anne E. Brunsdale) and Certain Residential Door Locks and Parts Thereof From Taiwan, Inv. No. 731-TA-433 (Final), USITC Pub. 2253, at 33-36 (January 1990) (Additional Views of Chairman Anne E. Brunsdale).

*Appendix D*

Three factors are particularly significant in my evaluation of the likelihood of material injury in the present investigation. First, it appears that the subject imports are quite substitutable for the ibuprofen produced by domestic firms. While different firms use slightly different processes in producing bulk ibuprofen,[10] each firm making ibuprofen tablets must obtain FDA approval of the bulk ibuprofen it wishes to use in its tablets.[11] As a result, ibuprofen from any approved source is likely to be highly substitutable for ibuprofen from any other approved source. The high degree of substitutability makes it more likely that an industry will be materially injured if substantial quantities of imports are sold at less than fair value.

Second, the alleged dumping and subsidy margins in these investigations are quite high. Petitioner alleges that the Indian ibuprofen producer benefits from a variety of countervailable subsidy programs and estimates the total effect of these programs is a net subsidy margin that may exceed 76 percent.[12] Based on petitioner's data, Commerce has calculated alleged dumping margins ranging from 3.0 to 7.55 percent.[13] While these margins are little more than petitioner's claims, they are the best information currently available concerning the level of the subsidies and dumping

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10. Report at A-4.

11. Report at A-10 and A-29.

12. Petition at 17.

13. Report at A-7.

and suggest that the price of Indian ibuprofen may be significantly below "fair" levels.

Finally, the share of the U.S. ibuprofen market accounted for by the Indian imports is not small enough, when combined with the other factors, to ensure that there is no material injury by reason of the "unfair" imports. Imports of bulk ibuprofen from India increased from [* * *] percent of consumption in 1988 to [* * *] percent in the first half of 1991, measured by quantity, and rose from [* * *] percent of U.S. apparent consumption in 1988 to [* * *] in the first half of 1991, measured by value.[14]

Taken together, these factors support a finding of a reasonable indication that an industry in the United States is materially injured by reason of imports of ibuprofen from India. While the market share is not particularly high, the alleged dumping and subsidy margins suggest that prices of the subject imports may be considerably below "fair" levels. Further, imported ibuprofen is a good substitute for that produced domestically so that any lowering of the subject import price is likely to affect the demand for domestic ibuprofen.

Therefore, based on the evidence available to us in this preliminary investigation, I find that there is a reasonable indication of material injury to domestic producers of bulk ibuprofen by reason of imports of bulk ibuprofen from India that is allegedly subsidized or sold at less than fair value.

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14. Report at A-25, Table 15.

## APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED APRIL 8, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-6004

CHEMINOR DRUGS, LTD.;
REDDY-CHEMINOR, INC.,

*Appellants*

v.

ETHYL CORPORATION;
JOHN DOES 1 THROUGH 10
(D.C. No. 94-cv-04371)

**Present:** BECKER, *Chief Judge*, SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO ROTH, LEWIS, McKEE, RENDELL, GARTH,* and MAGILL,*
*Circuit Judges*,

**SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC***

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* As to panel rehearing only.

* As to panel rehearing only.

*Appendix E*

The petition for rehearing filed by Appellants having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED. Chief Judge Becker, Judge Sloviter, Judge Stapleton, Judge Roth and Judge Alito would have granted rehearing.

BY THE COURT:

s/ [illegible]
Chief Judge

DATED: April -8 1999

## APPENDIX F — CONSTITUTIONAL PROVISION, RELEVANT STATUTES AND RULE

### U.S. Const., amend. I

### ARTICLE [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * *

### 19 U.S.C. § 1671b(a)

**§ 1671b. Preliminary determinations**

**(a) Determination by Commission of reasonable indication of injury**

**(1) General rule**

Except in the case of a petition dismissed by the administering authority under section 1671a(c)(3) of this title, the Commission, within the time specified in paragraph (2), shall determine, based on the information available to it at the time of the determination, whether there is a reasonable indication that —

**(A)** an industry in the United States —

**(i)** is materially injured, or

**(ii)** is threatened with material injury, or

**(B)** the establishment of an industry in the United States is materially retarded,

by reason of imports of the subject merchandise and that imports of the subject merchandise are not negligible. If the Commission finds that imports of the subject merchandise are negligible or otherwise makes a negative determination under this paragraph, the investigation shall be terminated.

**(2) Time for Commission determination**

The Commission shall make the determination described in paragraph (1) —

**(A)** in the case of a petition filed under section 1671a(b) of this title —

**(i)** within 45 days after the date on which the petition is filed, or

**(ii)** if the time has been extended pursuant to section 1671a(c)(1)(B) of this title, within 25 days after the date on which the Commission receives

notice from the administering authority of initiation of the investigation, and

**(B)** in the case of an investigation initiated under section 1671a(a) of this title, within 45 days after the date on which the Commission receives notice from the administering authority that an investigation has been initiated under such section.

* * *

**19 U.S.C. § 1677(7)**

**§ 1677. Definitions; special rules**

For purpose of this subtitle —

* * *

**(7) Material injury**

**(A) In general**

The term "material injury" means harm which is not inconsequential, immaterial, or unimportant.

*Appendix F*

**(B) Volume and consequent impact**

In making determinations under sections 1671b(a), 1671d(b), 1673b(a), and 1673d(b) of this title, the Commission, in each case —

**(i)** shall consider —

**(I)** the volume of imports of the subject merchandise,

**(II)** the effect of imports of that merchandise on prices in the United States for domestic like products, and

**(III)** the impact of imports of such merchandise on domestic producers of domestic like products, but only in the context of production operations within the United States; and

**(ii)** may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports.

In the notification required under section 1671d(d) or 1673d(d) of this title, as the case

may be, the Commission shall explain its analysis of each factor considered under clause (i), and identify each factor considered under clause (ii) and explain in full its relevance to the determination.

**(C) Evaluation of relevant factors**

For purposes of subparagraph (B) —

**(i) Volume**

In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.

**(ii) Price**

In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether —

**(I)** there has been significant price underselling by the imported merchandise as compared with the price of

domestic like products of the United States, and

**(II)** the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

**(iii) Impact on affected domestic industry**

In examining the impact required to be considered under subparagraph (B)(i)(III), the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to —

**(I)** actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,

**(II)** factors affecting domestic prices,

**(III)** actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,

**(IV)** actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and

**(V)** in a proceeding under part II of this subtitle, the magnitude of the margin of dumping.

The Commission shall evaluate all relevant economic factors described in this clause within the context of the business cycle and conditions of competition that are distinctive to the affected industry.

**(iv) Captive production**

If domestic producers internally transfer significant production of the domestic like product for the

production of a downstream article and sell significant production of the domestic like product in the merchant market, and the Commission finds that —

> **(I)** the domestic like product produced that is internally transferred for processing into that downstream article does not enter the merchant market for the domestic like product,
>
> **(II)** the domestic like product is the predominant material input in the production of that downstream article, and
>
> **(III)** the production of the domestic like product sold in the merchant market is not generally used in the production of that downstream article,

then the Commission, in determining market share and the factors affecting financial performance set forth in clause (iii), shall focus primarily on the merchant market for the domestic like product.

*Appendix F*

**(D) Special rules for agricultural products**

**(i)** The Commission shall not determine that there is no material injury or threat of material injury to United States producers of an agricultural commodity merely because the prevailing market price is at or above the minimum support price.

**(ii)** In the case of agricultural products, the Commission shall consider any increased burden on government income or price support programs.

**(E) Special rules**

For purposes of this paragraph —

**(i) Nature of countervailable subsidy**

In determining whether there is a threat of material injury, the Commission shall consider information provided to it by the administering authority regarding the nature of the countervailable subsidy granted by a foreign country (particularly whether the

countervailable subsidy is a subsidy described in Article 3 or 6.1 of the Subsidies Agreement) and the effects likely to be caused by the countervailable subsidy.

**(ii) Standard for determination**

The presence or absence of any factor which the Commission is required to evaluate under subparagraph (C) or (D) shall not necessarily give decisive guidance with respect to the determination by the Commission of material injury.

**(F) Threat of material injury**

**(i) In general**

In determining whether an industry in the United States is threatened with material injury by reason of imports (or sales for importation) of the subject merchandise, the Commission shall consider, among other relevant economic factors —

**(I)** if a countervailable subsidy is involved, such information as may be

presented to it by the administering authority as to the nature of the subsidy (particularly as to whether the countervailable subsidy is a subsidy described in Article 3 or 6.1 of the 522 Subsidies Agreement), and whether imports of the subject merchandise are likely to increase,

**(II)** any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports,

**(III)** a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports,

**(IV)** whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports,

**(V)** inventories of the subject merchandise,

**(VI)** the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products,

**(VII)** in any investigation under this subtitle which involves imports of both a raw agricultural product (within the meaning of paragraph (4)(E)(iv)) and any product processed from such raw agricultural product, the likelihood that there will be increased imports, by reason of product shifting, if there is

an affirmative determination by the Commission under section 1671d(b)(1) or 1673d(b)(1) of this title with respect to either the raw agricultural product or the processed agricultural product (but not both),

**(VIII)** the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and

**(IX)** any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports (or sale for importation) of the subject merchandise (whether or not it is actually being imported at the time).

**(ii) Basis for determination**

The Commission shall consider the factors set forth in clause (i) as a

whole in making a determination of whether further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted under this subtitle. The presence or absence of any factor which the Commission is required to consider under clause (i) shall not necessarily give decisive guidance with respect to the determination. Such a determination may not be made on the basis of mere conjecture or supposition.

**(iii) Effect of dumping in third-country markets**

**(I) In general**

In investigations under part II of this subtitle, the Commission shall consider whether dumping in the markets of foreign countries (as evidenced by dumping findings or antidumping remedies in other WTO member markets against the same class or kind of merchandise manufactured or

exported by the same party as under investigation) suggests a threat of material injury to the domestic industry. In the course of its investigation, the Commission shall request information from the foreign manufacturer, exporter, or United States importer concerning this issue.

**(II) WTO member market**

For purposes of this clause, the term "WTO member market" means the market of any country which is a WTO member.

**(III) European communities**

For purposes of this clause, the European Communities shall be treated as a foreign country.

**(G) Cumulation for determining material injury**

**(i) In general**

For purposes of clauses (i) and (ii) of subparagraph (C), and subject to

clause (ii), the Commission shall cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which —

> **(I)** petitions were filed under section 1671a(b) or 1673a(b) of this title on the same day,
>
> **(II)** investigations were initiated under section 1671a(a) or 1673a(a) of this title on the same day, or
>
> **(III)** petitions were filed under section 1671a(b) or 1673a(b) of this title and investigations were initiated under section 1671a(a) or 1673a(a) of this title on the same day,

if such imports compete with each other and with domestic like products in the United States market.

**(ii) Exceptions**

The Commission shall not cumulatively assess the volume and effect of imports under clause (i) —

**(I)** with respect to which the administering authority has made a preliminary negative determination, unless the administering authority subsequently made a final affirmative determination with respect to those imports before the Commission's final determination is made;

**(II)** from any country with respect to which the investigation has been terminated;

**(III)** from any country designated as a beneficiary country under the Caribbean Basin Economic Recovery Act (19 U.S.C. 2701 et seq.) for purposes of making a determination with respect to that country, except that the volume and effect of imports of the subject merchandise from such country may be cumulatively assessed with imports of the subject merchandise from any other country designated as such a beneficiary country to the extent permitted by clause (i); or

*Appendix F*

**(IV)** from any country that is a party to an agreement with the United States establishing a free trade area, which entered into force and effect before January 1, 1987, unless the Commission determines that a domestic industry is materially injured or threatened with material injury by reason of imports from that country.

**(iii) Records in final investigations**

In each final determination in which it cumulatively assesses the volume and effect of imports under clause (i), the Commission shall make its determinations based on the record compiled in the first investigation in which it makes a final determination, except that when the administering authority issues its final determination in a subsequently completed investigation, the Commission shall permit the parties in the subsequent investigation to submit comments concerning the significance of the administering authority's final determination, and shall include such comments and the administering authority's final

determination in the record for the subsequent investigation.

**(iv) Regional industry determinations**

In an investigation which involves a regional industry, and in which the Commission decides that the volume and effect of imports should be cumulatively assessed under this subparagraph, such assessment shall be based upon the volume and effect of imports into the region or regions determined by the Commission. The provisions of clause (iii) shall apply to such investigations.

**(H) Cumulation for determining threat of material injury**

To the extent practicable and subject to subparagraph (G)(ii), for purposes of clause (i)(III) and (IV) of subparagraph (F), the Commission may cumulatively assess the volume and price effects or imports of the subject merchandise from all countries with respect to which —

(i) petitions were filed under section 1671a(b) or 1673a(b) of this title on the same day,

**(ii)** investigations were initiated under section 1671a(a) or 1673a(a) of this title on the same day, or

**(iii)** petitions were filed under section 1671a(b) or 1673a(b) of this title and investigations were initiated under section 1671a(a) or 1673a(a) of this title on the same day,

if such imports compete with each other and with domestic like products in the United States market.

**(I) Consideration of post-petition information**

The Commission shall consider whether any change in the volume, price effects, or impact of imports of the subject merchandise since the filing of the petition in an investigation under part I or II of this subtitle is related to the pendency of the investigation and, if so, the Commission may reduce the weight accorded to the data for the period after the filing of the petition in making its determination of material injury, threat of material, injury, or material retardation of the establishment of an industry in the United States.

* * *

*Appendix F*

**Fed. R. Civ. P. 60(b)(3)**

**Rule 60. Relief From Judgment or Order**

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**(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

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